(11)

03-9659

No. 03-____

IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

DOUGLAS DRETKE,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether the Court of Appeals—in reinstating on remand from this Court its prior rejection of petitioner's claim that the prosecution had purposefully excluded African-Americans from his capital jury in violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986)—so contravened this Court's decision and analysis of the evidence in *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003), that "an exercise of this Court's supervisory powers" under Supreme Court Rule 10(a) is required to sustain the protections against invidious discrimination set forth in *Batson* and *Miller-El* and the safeguards against arbitrary fact-finding set forth in 28 U.S.C. §§ 2254(d)(2) and (e)(1).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals denying habeas relief (App. 3a-22a) is reported at 2004 WL 352542. The previous decision of this Court, remanding the case to the Fifth Circuit for issuance of a Certificate of Appealability (COA) and consideration of the merits (App. 23a-66a) is reported at 537 U.S. 322 (2003). The opinion of the court of appeals denying a COA is reported at 261 F.3d 445 (5th Cir. 2001). The opinion of the district court and the findings of the magistrate judge that it adopts are unreported but available in the Joint Appendix (JA) to the merits briefs filed in this Court in *Miller-El* v. *Cockrell*, No. 01-7662, at JA 942-947 and JA 898-941, respectively. The opinion of the Texas Court of Criminal Appeals abating petitioner's appeal and remanding

to the trial court (JA 832-836) is reported at 748 S.W.2d 459. The state trial court's findings of fact and conclusions of law after abatement of the appeal (JA 873-879) and the second opinion of the Texas Court of Criminal Appeal (JA 873-879) are unreported. Selected excerpts from the *voir dire* transcript are included at App. 67a-68a.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section One of the Fourteenth Amendment and 28 U.S.C. §§ 2254(d)(2) and (e)(1) are set forth at App. 1a-2a.

INTRODUCTION

This Court has already expended considerable time and resources attempting to correct the Fifth Circuit's begrudging approach to claims of discrimination in jury selection under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and that court's myopic application of *Batson* to this very case. In *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003), this Court reaffirmed *Batson's* vitality by "reviewing in some detail the extensive evidence concerning jury selection procedures" in petitioner's trial (App. 28a), concluding that petitioner had identified multiple evidentiary sources to support an inference of purposeful discrimination, and ruling that the court of appeals should have issued a COA and afforded meaningful review to petitioner's claims. This Court also provided a detailed roadmap for deciding petitioner's appeal on the merits, including clear guidance on how to evaluate the specific evidence pertaining to the determinative final step of the *Batson* inquiry: whether, despite their protestations to the contrary, the prosecutors here discriminated purposefully in excluding all but one African-American veniremember from petitioner's capital jury. App. 35a-44a.

Yet on remand, the Fifth Circuit flouted this explicit guidance, reverting instead to the same empty approach this Court specifically rejected in *Miller-El*. App. 38a (court of appeals erred by failing to "give full consideration to the substantial evidence petitioner put forth in support of his *prima facie* case" and by instead accepting "without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial"). Thus, whereas this Court in *Miller-El* specifically noted the state courts' failure even to mention the disturbing historical record of discrimination in jury selection established by the prosecutor's office (*id.* at 44a), the Fifth Circuit *again* ignored that failure and itself dismissed this sordid history as irrelevant to the ultimate issue and superseded by the state courts' finding of benign prosecutorial intent. *Id.* at 9a-10a. Whereas this Court further noted that the prosecution's use of "jury shuffles" to remove African-Americans from the front of petitioner's venire panel "raise[d] a suspicion that the State sought to exclude African-Americans from the jury" (*id.* at 43a), the Fifth Circuit dismissed this prosecutorial conduct on the irrelevant ground that petitioner's counsel, too, had used jury shuffles. *Id.* at 10a. Whereas this Court concluded that the prosecutors had engaged in disparate questioning of African-American and white jurors in petitioner's case, and faulted the Fifth Circuit for concluding otherwise (*id.* at 39a-40a), on remand the court of appeals *again* reached the contrary conclusion, this time by reciting almost *verbatim*—but without attribution—the reasoning of the lone dissenter in this Court. *Id.* at 10a-18a. And finally, despite this Court's express direction to consider these factors—history of discrimination, jury shuffles, and disparate questioning, as well as the racially disproportionate strikes themselves—in evaluating the prosecutors' credibility in denying discriminatory intent, the Fifth Circuit *again* concluded that "the credibility of the reasons is *self-evident*." *Id.* at 11a. (emphasis added).

In *Batson* itself this Court sought to make meaningful the Constitution's prohibition against intentional race discrimination in jury selection by ensuring that prosecutors'

peremptory strikes were not rendered "immune from constitutional scrutiny." 476 U.S. at 92-93. The Court recognized that if prosecutors were allowed to rebut the defendant's *prima facie* case of discrimination with general assertions of non-discriminatory motive, the "core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race . . . 'would be but a vain and illusory requirement.'" *Id.* at 97-98 (quoting *Norris* v. *Alabama*, 294 U.S. 587, 598 (1935)). In *Miller-El* this Court sought to give greater substance to *Batson's* promise by carefully outlining how lower courts should review circumstantial evidence of purposeful discrimination in the jury-selection context. But the Fifth Circuit here, in the face of this Court's vacatur of its prior decision and remand to consider petitioner's appeal in the light of this Court's opinion, again "accept[ed] without question the state court's evaluation." If that decision is allowed to stand, the protections this Court set forth in *Batson*, as well as the requirements of § 2254, will be but "vain and illusory," despite this Court's ruling.

It is critically important that this Court review the Fifth Circuit's decision, therefore, for three interrelated reasons. *First*, at a minimum, the Court should affirm its supervisory authority to prevent lower courts from ignoring its explicit direction regarding the proper application of this Court's precedents. *Second*, this Court should grant review to vindicate its objective in granting review the first time—to ensure that *Batson* retains meaning by providing an analytical framework for the lower courts to follow in evaluating the evidence under the three-step *Batson* inquiry. The Fifth Circuit's reaction to this Court's remand suggests that unfortunately, although the Court's initial *Miller-El* opinion painstakingly presented a clear and thorough analysis of the relevant evidentiary factors and their significance, that alone will not suffice to assure faithful implementation of *Batson* unless this Court provides a similarly exacting model of the appropriate methodology for evaluating evidence under the applicable standards of proof. *Finally*, this Court should grant review to provide similar guidance to the lower courts regarding the evaluation of evidence under 28

U.S.C. §§ 2254(d)(2) and (e)(1). This case provides a uniquely effective and important vehicle to clarify the application of these statutory provisions, because they "embod[y]" the appropriate degree of deference to trial court determinations of the ultimate question of discriminatory intent under *Batson*. App. 37a. In short, if the Fifth Circuit's uncritical rubber-stamping of the state court's determination of no purposeful discrimination in *this* case is allowed to stand, then neither the substantive protections of *Batson* nor the procedural safeguards of §§ 2254(d)(2) and (e)(1) retain meaning.

STATEMENT OF THE CASE

In 1986 petitioner Thomas Joe Miller-El—an African-American defendant—was convicted of capital murder and sentenced to death by a jury from which the prosecutors had excluded 10 of the 11 African-Americans qualified to serve by striking them peremptorily. *See* App. 23a.

After the completion of *voir dire* for jury selection, petitioner moved to strike the jury due to purposeful racial discrimination in its selection, based on the then-controlling precedent of *Swain* v. *Alabama*, 380 U.S. 202 (1965), which required petitioner to show that the "prosecution's conduct was part of a larger pattern of discrimination aimed at excluding African-Americans from jury service." App. 25a. At the *Swain* hearing, "petitioner presented extensive evidence" of such a pattern and practice of discrimination by the Dallas County, Texas, District Attorney's office. *Id.* The trial judge, however, concluded that while racial discrimination in jury selection "'may have been done by individual prosecutors in individual cases,'" there was no evidence that indicated a "'systematic exclusion of blacks as a matter of policy by the District Attorney's office.'" *Id.* (internal citation omitted). The motion to strike was therefore denied, and petitioner was tried, found guilty, and sentenced to death.

While petitioner's appeal was pending, this Court decided *Batson* v. *Kentucky* and in so doing "established its

three-part process for evaluating claims that a prosecutor used peremptory challenges in violation of the Equal Protection Clause." App. 25a. "First, a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." App. 25a-26a (internal citations omitted).

The Texas Court of Criminal Appeals "acknowledg[ed that] petitioner had established an inference of purposeful discrimination" under *Batson* step one, and remanded to the trial court for a *Batson* hearing. App. 26a. At this post-trial hearing, which took place "a little over two years after petitioner's jury was empaneled," the trial court admitted all of the evidence submitted at the *Swain* hearing as well as additional evidence and testimony. *Id.*

The trial court concluded, however, that petitioner's evidence failed to "even raise an inference of racial motivation in the use of the state's peremptory challenges" and therefore petitioner had failed to make out a *prima facie* case of discrimination as required under *Batson* step one. App. 26a. The court went on to conclude, however, that the State would have prevailed on steps two and three in any event, because the prosecutors "had offered credible, race-neutral explanations" for each of the 10 African-Americans excluded. *Id.* The trial court also "found 'no disparate prosecutorial examination of any of the veniremen in question'" and found "'that the primary reasons for the exercise'" of the peremptory challenges against the African-American veniremen in question was "'their reluctance to assess or reservations concerning the imposition of the death penalty.'" *Id.* (internal citation omitted). "There was no discussion of petitioner's other evidence." *Id.*

The Texas Court of Criminal Appeals denied petitioner's appeal, and this Court denied certiorari. *Miller-El* v. *Texas*, 510 U.S. 831 (1993). After unsuccessfully pursuing

state habeas relief, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254, raising several claims, including a claim that the prosecutors had selected his capital jury in violation of *Batson*. Although the federal magistrate judge who considered the merits of the *Batson* claim concluded that only a pattern and practice of discrimination in jury selection could explain the "appalling" statistics regarding the exclusion of African-Americans from jury service in Dallas County, he considered such evidence relevant only to whether petitioner had established a *prima facie* case, and specifically declined to consider it in deciding the ultimate question of purposeful discrimination. *See* App. 26a-27a; JA 919.

The United States District Court adopted the magistrate judge's recommendations and denied relief. App. 27a. The district court denied petitioner's application for a COA, as did the Fifth Circuit. *Id.*

This Court granted certiorari. *Miller-El* v. *Cockrell*, 534 U.S. 1122 (2002). The Court—with a lone dissent—had "no difficulty concluding that a COA should have issued." App. 38a. The Court identified two fundamental flaws in the Fifth Circuit's analysis. First, the Fifth Circuit erred by deciding the merits of the underlying constitutional claim rather than the "debatability" of that claim as is required in determining whether a COA should issue. *Id.* at 39a. Second, in addressing the merits of petitioner's claim, the Fifth Circuit erred in its analysis and evaluation of petitioner's evidence. App. 38a (court of appeals erred by failing to consider fully all of the relevant evidence including that in support of petitioner's *prima facie* case, and by accepting "without question" the state court's credibility determinations). To correct the Fifth Circuit's flawed approach, this Court set forth an analytical model for evaluating the merits of a *Batson* claim under that decision's three-step framework. Applying that model to the threshold COA question, the Court concluded that a COA should issue. *Id.*

On remand, in an opinion that literally incorporated *verbatim* (without attribution) analyses and discussions from

the dissenting opinion in this Court and from the State's brief on remand (which essentially repeated the State's unsuccessful brief in this Court), the Fifth Circuit denied relief on the merits of petitioner's *Batson* claim, concluding that petitioner "has failed to show by clear and convincing evidence that the state court erred in finding no purposeful discrimination." App. 22a.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT IGNORED THIS COURT'S EXPLICIT GUIDANCE REGARDING THE PROPER ANALYTICAL FRAMEWORK FOR EVALUATING THE MERITS OF PETITIONER'S *BATSON* CLAIM UNDER 28 U.S.C. § 2254.

The court of appeals was directed by this Court to determine whether petitioner was entitled to relief under 28 U.S.C. §§ 2254(d)(2) and (e)(1) based on his claim that the prosecution purposefully discriminated against African-Americans during his jury selection in violation of *Batson*. This Court provided specific guidance for how that analysis was to be conducted. The court of appeals paid lip service to that guidance but disregarded it in substance. As a result, it grievously misapplied the relevant standard and set a dangerous precedent.

The issue on remand focused exclusively on step three of the *Batson* inquiry. Although the state trial court had previously ruled that petitioner never established a *prima facie* case of discrimination, the State conceded before this Court that that ruling was clear error, and "there is no dispute" that petitioner has satisfied *Batson* step one. App. 35a. Because petitioner acknowledged that the State had proffered facially neutral reasons for its strikes, step two is satisfied as well. *Id.*

The remaining question, as this Court explained, is "step three: whether Miller-El 'has carried his burden of proving purposeful discrimination.'" *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 359 (1991)). Because the trial court's decision on the ultimate question of purposeful discrimination is a finding of fact, it will not be overturned on

direct review unless it is clearly erroneous. App. 36a-37a. Under 28 U.S.C. § 2254, state-court fact findings are given the same deference; where § 2254 applies, this Court's "habeas jurisprudence embodies" the deference accorded to a determination under *Batson* step three on direct review. App. 37a (under § 2254(e)(1), factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, and under § 2254(d)(2), a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding).

The proper evaluation of the evidence under *Batson* step three—as explicated by this Court in *Miller-El*—therefore mirrors the proper application of the fact-evaluation standards under § 2254. This Court emphasized that the deference due such findings of fact, whether on direct review or on federal habeas, does not "imply abandonment or abdication of judicial review." App. 37a. Indeed, if the standards under §§ 2254(d)(2) and (e)(1) have any meaning, they will by definition require relief in some cases. *Id.* This is such a case.

Accordingly, in laying out the analytical framework for the Fifth Circuit to apply on remand, this Court identified two categories of evidence that the Fifth Circuit was required to consider—and to consider in its totality—in evaluating petitioner's claim: the evidence of a pattern and practice of racial discrimination in jury selection in Dallas County, and the evidence that directly related to the conduct of the prosecutors in this case. App. 28a. The Court emphasized that "[i]t goes without saying" that a proper evaluation of a claim under *Batson* step three requires an evaluation and weighing of all of this relevant evidence, including "the facts and circumstances adduced in support of the *prima facie* case." *Id.* at 37a (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000)).

Purportedly applying this standard on remand, the Fifth Circuit concluded that none of petitioner's evidence,

"either collectively or separately,"[1] indicated by clear and convincing evidence that the state trial court erred. App. 22a. The court of appeals failed, however, to do in substance what it professed to do in form. By refusing to give full consideration to the evidence adduced by petitioner in support of his *prima facie* case and by accepting without question the state court's credibility determinations, the court of appeals not only undermined this Court's authority but deprived *Batson* and § 2254 of meaning.

A. The Court Of Appeals Failed To Follow This Court's Direction To Consider Fully Evidence Of A Pattern And Practice Of Discrimination.

This Court held that historical evidence of racial discrimination by the District Attorney's office was clearly relevant to the ultimate question of purposeful discrimination in petitioner's jury selection, and it faulted the state courts for making "*no mention* . . . of the historical record of purposeful discrimination" in evaluating petitioner's claim. App. 44a (emphasis added). This failure heightened the concern that the state courts had erred because, even when presented with this evidence of a pattern and practice of discrimination, the trial court "somehow reasoned that there was not even the inference of discrimination to support a *prima facie* case"—a clear error that the State subsequently declined to defend. *Id.*

The Fifth Circuit on remand, however, never addressed or even acknowledged this failure by the state court. Nor

[1] While this "collectively or separately" phraseology (which states the correct standard, *see* pp. 14, 26-27 *infra*) appears in the penultimate paragraph of the court of appeals' opinion, it is the *only* indication that suggests that the court in fact engaged in the required holistic appraisal of the evidence. Throughout its opinion, the Fifth Circuit considers one category after another of petitioner's evidence, discusses that category in isolation, and concludes that *it* does not carry petitioner's burden. Nowhere in the opinion does the court explicitly perform, or appear to perform, the "collective" analysis verbalized in the penultimate paragraph of its opinion.

did it weigh the impact of that failure on the reasonableness of the state court's ultimate determination of a lack of purposeful discrimination. That failure directly contravenes this Court's guidance: This Court explicitly identified the state court's failure in this regard—and the state court's conceded commission of clear error on step one—as raising concern over the reasonableness of the state court's determination on step three.

In addition, notwithstanding this Court's admonition that "[i]t goes without saying" that evidence adduced to support petitioner's *prima facie* case should be weighed in making the ultimate determination under *Batson* step three, the Fifth Circuit discounted the relevance of the historical evidence "because Miller-El has already met the burden under the first step of *Batson* and now must prove actual pretext in his case." App. 9a-10a. The notion that the stronger a *Batson* claimant's *prima facie* case at step one, the more cogent is the reason for ignoring that evidence at step three is completely unsound—as this Court, which took careful note of the fact that petitioner had "already met" step one, manifestly recognized in insisting nonetheless that the powerful historical evidence *had* to be considered in step three.

What is more, although in words the court of appeals seemingly acknowledged that historical evidence might undermine a prosecutor's race-neutral reasons, in practice it declined even to consider that evidence in this case because the state court, which was "in the best position to make a factual credibility determination, heard the historical evidence and determined that the prosecutors' race-neutral reasons for the peremptory strikes to be genuine." *Id.* The Fifth Circuit failed even to acknowledge what this Court took pains to point out: that the trial court conducted the *Batson* hearing more than *two years* after jury selection, significantly reducing any advantage in making credibility determinations, *id.* at 26a, and that these determinations were made by a trial judge who, even after a remand in which the Texas Court of Criminal Appeals had found that

petitioner had met his step-one burden, "somehow" explicitly concluded that he had *not* done so, (*id.* at 37a).

The court of appeals also ignored other evidence of the historical discrimination that this Court specifically directed it to weigh. First, this Court noted that petitioner's evidence indicated that African-Americans "almost categorically were excluded from jury service." App. 43a. This evidence, according to this Court, "reveals that the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection," and such bias is "of course relevant to the extent it casts doubt on the legitimacy of the State's motives in petitioner's case." *Id.* But the Fifth Circuit again refused to give this evidence any weight, because the court viewed it as relevant only to step one, and in any event had already concluded that the trial court's credibility determinations should be accepted. *Id.* at 9a-10a.

Finally, the Fifth Circuit failed altogether to mention petitioner's remaining historical evidence. Both prosecutors involved in petitioner's jury selection joined the District Attorney's Office when that office formally trained its prosecutors to exclude minorities from juries. App. 43a. As this Court indicated, that evidence leads to the "supposition that race was a factor" in petitioner's jury selection, and this supposition "could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards." *Id.* This supposition is further reinforced, this Court held, by evidence that one of the prosecutors in this case had been found to have discriminated on the basis of race in another capital murder trial conducted while petitioner's state-court appeal was pending. *Id.* at 42a (citing *Chambers* v. *State*, 784 S.W.2d 29, 31 (Tex. Crim. App. 1989)).

Yet the Fifth Circuit made no mention of any of this evidence. Rather than weighing the credibility of the proffered race-neutral reasons against this backdrop of historical discrimination, as this Court directed, the Fifth Circuit did just the opposite: it accepted without question the state

court's credibility determinations—and then having done so, rejected any relevance of the historical evidence because it had already concluded that the prosecutors had legitimate motives to strike the jurors in question. This reasoning is flatly inconsistent with this Court's guidance, and it results in the improper application of *Batson* step three as well as of §§ 2254(d)(2) and (e)(1).

B. The Court Of Appeals Failed To Follow This Court's Direction To Weigh The Evidence That The Prosecutors Used Jury Shuffles To Manipulate The Racial Composition Of The Jury.

This Court also directed the Fifth Circuit to consider the evidence regarding "jury shuffles." App. 42a. The jury shuffle is a technique the Dallas County District Attorney's Office used—by its own admission—to "manipulate the racial composition of the jury." *Id.* Under Texas criminal procedure practice, parties are permitted to "rearrange the order in which members of the venire are examined so as to increase the likelihood that visually preferable venire members will be moved forward and empaneled." *Id.* at 30a. The party requesting the procedure, with no information other than the appearance of the venire members, "literally shuffles the juror cards, and the venire members are then reseated in the new order." *Id.* Shuffling is a tool to manipulate the racial composition of the jury because jurors who are shuffled to the back of the panel are unlikely to serve, given that any prospective juror not questioned during *voir dire* is dismissed at the end of the week. *Id.* at 30a-31a.

This Court agreed with petitioner that the "prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury." App. 42a. This suspicion "tends to erode the credibility of the prosecution's assertion that race was not a motivating factor." *Id.* And this Court faulted the state court for "apparently ignor[ing]"

evidence that the District Attorney's Office had admittedly used this technique for just such a racially discriminatory purpose. *Id.*

But the Fifth Circuit declined to consider the State's discriminatory use of jury shuffles, offering only the irrelevant observation that the defense had also requested shuffles. App. at 10a. The court failed to weigh the effect that this practice of "jury shuffling" had on the credibility of the prosecutors' assertions of non-discriminatory motive—a concern identified by this Court as important in conducting the *Batson* step-three analysis. *Id.* at 42a. And the court never even acknowledged the state court's apparent refusal to consider evidence regarding the past discriminatory use of this tactic by Dallas County prosecutors to exclude African-Americans from jury service—evidence that "amplified" this Court's concerns. *Id.* at 42a, 44a. Instead, the Fifth Circuit dismissed the evidence of the jury shuffles as "circumstantial evidence" that does not "overcome" the prosecutors' proffered race-neutral reasons for their strikes. *Id.* at 10a.

Of course, as this Court had already explained, the question is not whether each individual piece of evidence can itself "overcome" the proffered race-neutral reasons; the question is whether the cumulative weight of such evidence so erodes the credibility of the prosecution's assertion that race was not a factor that that assertion becomes "simply too incredible" to believe. *Hernandez* v. *New York*, 500 U.S. 352, 369 (1991).

The "jury shuffle" provides a perfect opportunity to discriminate for those "who are of a mind to discriminate," *Batson*, 476 U.S. at 96, and the pattern and practice evidence adduced by petitioner demonstrates that the District Attorney's Office was "suffused" with such bias. Indeed, the shuffles show that the prosecution was attempting to exclude African-Americans from the jury before it knew anything about their views—when it had "no information about the prospective jurors other than their appearance." App. 30a. The shuffles thus undermine "the credibility of the prosecution's assertion that race was not a motivating factor in the jury selection" (*id.* at 42a), and instead support the conclusion that the race-neutral reasons which the prosecution later cited—and which the panel unreservedly endorsed—were pretexts for discrimination.

C. The Court Of Appeals Failed To Follow This Court's Guidance To Consider The Evidence That The Prosecution Used Disparate Questioning To Remove African-Americans From The Jury.

The record evidence at the post-trial *Batson* hearing showed that the prosecutors in petitioner's trial had questioned venire members differently based on race, with the intent to disqualify or otherwise remove African-Americans from the jury. *See* App. at 28a-30a, 40a. The state trial court, however, found that there was no disparate questioning, and the Fifth Circuit in denying petitioner's COA agreed, concluding that "[t]he findings of the state court that there was no disparate questioning of the *Batson* jurors . . . is fully supported by the record." *Id.* at 40a (quoting *Miller-El*, 261 F.3d at 452).

This Court rejected that conclusion. App. 40a. The Court found that the Fifth Circuit's interpretation of the evidence in this regard was "dismissive and strained," and that "disparate questioning *did* occur." *Id.* (emphasis added). This Court concluded that the disparate questioning concerned two topics: the venire members' views on the death penalty and on minimum sentencing. Yet on remand, the Fifth Circuit continued to treat dismissively the very evidence of racially disparate questioning addressed by this Court.

1. Views on the death penalty

The prosecutors asked all of the potential jurors about their views on the death penalty, but this inquiry was prefaced, in some cases, with a graphic description of an execution that was intended to elicit hesitancy about the death penalty. App. at 41a. This graphic description was used for 53% of African-Americans, but with only 6% of white venire

members. *Id.* The State argued before this Court that that statistical disparity was not based on race but was the result of a disproportionate number of African-American venire members having indicated doubts about the death penalty on their juror questionnaires. *Id.*

This Court rejected that explanation, finding that it "cannot be accepted without further inquiry" because "the State's own evidence is inconsistent with that explanation." App. 41a. As this Court explained, even by the State's own reckoning, 70% of the African-Americans who expressed hesitancy about the death penalty received the graphic script while only 20% of the potential white jurors who had expressed hesitancy received that script. *Id.*

Yet on remand the State offered the very same explanation—in fact submitting an almost identical brief. And the Fifth Circuit in turn, far from undertaking the "further inquiry" mandated by this Court, proceeded to reach the same conclusion that this Court had already rejected, stating that "the record . . . reveals that the disparate questioning of venire members depended on the member's views on capital punishment and not race." App. 18a. Further demonstrating its disregard for this Court's decision, the Fifth Circuit's analysis on this point consisted entirely of passages taken almost *verbatim* and without attribution from the *dissent* to this Court's opinion. *Compare id.* at 61a-63a (Thomas, J., dissenting) *with id.* at 19a-21a.

Unsurprisingly, therefore, the Fifth Circuit repeated its previous error of "accept[ing] without question the state court's evaluation of the demeanor and credibility of the prosecutors and jurors in petitioner's trial." App. 38a. Rather than examining whether there was evidence in the record to support the state court's conclusion that there was no disparate questioning, the Fifth Circuit simply accepted that conclusion, "presuming" that there must be additional evidence—not in the record—that supported the state court's conclusion. *Id.* at 19a-20a.

Specifically, of the 10 white venire members identified by the State as having expressed hesitancy about the death

penalty on their juror questionnaires, *only two* were given the graphic script, while of the 10 African-American venire members identified by the State as having similarly expressed hesitancy, *seven* received the graphic script. App. at 41a. Petitioner contended that there was therefore no force to the State's argument that the disparate questioning was based on the potential jurors' views about the death penalty, and there was no explanation for the statistical disparity other than race. Reply Brief for Petitioner 15, *Miller-El* v. *Cockrell*, No. 01-7662 (U.S. 2002). The Fifth Circuit, however, concluded that because the State claimed that the disparate questioning was driven by the jurors' answers about the death penalty on their juror questionnaires, the eight white jurors who were not given the graphic script "presumably" had answered their questionnaires in a way that indicated they were firmly opposed to the death penalty, such that there was no reason to give them the graphic script to "find out" their views. App. 19a-20a.

The Fifth Circuit adopted this theory from the dissent to this Court's opinion in *Miller-El*, which likewise hypothesized that the prosecution used the graphic script only with jurors whose juror questionnaires indicated ambivalence about the death penalty. App. at 61a-62a (Thomas, J., dissenting). It imagined that jurors who expressed clear opposition to the death penalty escaped the graphic script because their views needed no clarification. *Id.* at 60a. This theory rests entirely on speculation, however, because the questionnaires of most of the white jurors—including many of those whose *voir dire* testimony the dissent cites—*were not part of the record*. *Id.* at 61a.[2] And most important, this theory was obviously rejected by the Justices who formed the majority of this Court in *Miller-El*.

Of course, §§ 2254(d)(2) and (e)(1) require an evaluation of the factual determinations actually made by the state

[2] Miller-El sought discovery of the remainder of the white jurors' questionnaires in federal district court, but was not granted access to this information.

court, and of its decisions based on factual determinations made "in light of the evidence presented in the state-court proceeding." Evidence outside that record—particularly evidence that is only "presumed" to exist—is not relevant. In any event, as this Court pointed out, if such evidence had existed, "it cannot be presumed that the State would have refrained from introducing it." App. 41a-42a (internal citations and quotation marks omitted).

2. Minimum sentencing

The prosecutors also questioned potential jurors differently about their willingness to impose the minimum sentence for murder. App. at 28a-29a. Under Texas law at the time of petitioner's trial, an unwillingness to impose the minimum sentence was cause for removal, *Huffman* v. *State*, 450 S.W.2d 858, 861 (Tex. Crim. App. 1970), *vacated in part sub. nom. Huffman* v. *Beto*, 408 U.S. 936 (1972), and questioning in this regard is a strategy normally used by the defense to "weed out pro-state members of the venire" (App. 29a).

"[I]ronically," however, the prosecutors in petitioner's trial themselves employed this strategy (App. 29a), and in a starkly disparate way: 94% of the whites were informed of the statutory minimum before being asked whether they could impose that minimum, while only 12.4% of African-Americans were so informed of the statutory minimum (*id.* at 41a). The State proffered "[n]o explanation . . . for the statistical disparity." *Id.* Accordingly, this Court concluded that a "fair interpretation" of this evidence is "that the prosecutors designed their questions to elicit responses that would justify the removal of African-Americans from the venire." *Id.* at 42a.

Yet with precisely the same record the Fifth Circuit on remand concluded the opposite: that "[t]he prosecution also did not question venire members differently concerning their willingness to impose the minimum punishment for the lesser-included defense of murder." App. 21a. The court of appeals explained that the prosecution used the different

questioning on the minimum sentence issue only "as an effort to get venire members the prosecution felt to be ambivalent about the death penalty dismissed for cause." *Id.*; *see also id.* at 64a (Thomas, J., dissenting) (same).

Aside from the dubious logic of that assertion, it also contradicts a specific finding of this Court. That is, the Fifth Circuit asserted that the African-American venire members who were given the "allegedly manipulative minimum punishment script" were given that script because they were all opposed to the death penalty in varying degrees. *Id.* at 21a; *id.* at 64a (Thomas, J., dissenting) (same). But this Court had previously found that there were white venire members who "also expressed ambivalence about the death penalty in a manner similar to their African-American counterparts" but were not subjected to this manipulative questioning. *Id.* at 40a; *see also* Respondent's Brief 19 & n.44, *Miller-El* v. *Cockrell*, No. 01-7662 (U.S. 2002). And in any event, putting aside whether the State's characterization of "ambivalence" is accurate with respect to the African-Americans who were given the graphic script, its position still leaves unexplained the State's failure to use its manipulative script with the vast majority of white venire members who expressed reservations about the death penalty. App. 41a; Reply Brief for Petitioner 17 n.23, *Miller-El* v. *Cockrell*, No. 01-7662 (U.S. 2002).

Moreover, the Fifth Circuit never even acknowledged, much less accounted for, a fact this Court found highly significant: that while petitioner's appeal was pending, the Texas Court of Criminal Appeals "found a *Batson* violation where this precise line of questioning on mandatory minimums was employed by one of the same prosecutors who tried the instant case." App. 42a. By failing to consider all the evidence and the light it sheds on the motives and credibility of the prosecutors, the Fifth Circuit impermissibly deviated from this Court's guidance and from the requirements of § 2254.

D. The Court Of Appeals Improperly Accepted Without Question The State Court's Credibility Determinations And Failed To Follow This Court's Guidance Regarding Similarly Situated Venire Members.

This Court explained that the "critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." App. 35a. That question "comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible." *Id.* Whether those explanations were credible, and in turn whether the state court's determination in this regard was reasonable under § 2254, must of course be viewed in light of all the evidence. App. 37a; *Batson*, 476 U.S. at 93 (quoting *Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *Hernandez*, 500 U.S. at 365; *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000).

Accordingly, this Court first noted that the prosecution in petitioner's trial had used its peremptory strikes to remove 91% of the eligible African-American venire members, while it had used such strikes against only 13% of the eligible non-black prospective jurors. App. 28a, 39a. This "statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors," according to the Court, because [h]appenstance is unlikely to produce this disparity." *Id.* at 39a.

The Court also pointed out that the trial court's traditional advantage in judging credibility, based on its contemporaneous observation of the jury selection process, was significantly reduced here because the *Batson* hearing was not held until more than two years after the jury was empaneled. App. 39a. As a result, this Court noted, "the evidence presented to the trial court at the *Batson* hearing was subject to the usual risks of imprecision and distortion from the passage of time." *Id.* And the Court observed that ra-

cially disparate questioning of potential jurors will affect the evaluation of whether those jurors in fact have "divergent" views that could justify a peremptory strike and must be considered when evaluating pretext. Specifically, "if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual." *Id.* at 40a-41a.

Once again, however, the Fifth Circuit on remand ignored this guidance. Its analysis of whether the prosecutors' race-neutral reasons were pretexts for discrimination, including whether there were similarly situated white jurors, makes no mention of (1) the two-year delay before the *Batson* hearing was held, (2) the gross racial statistical disparity in peremptory strikes, (3) the effect of disparate questioning on the characterization of the venire members views, or (4) any of the other evidence that this Court identified as relevant to the analysis. Instead, the court simply imported, frequently *verbatim*, many of the State's previously-rejected arguments attempting to distinguish the views of the challenged jurors. *Compare* App. 11a-18a *with* Brief of Appellee (on remand) 6-13, 16-18, *and* Brief of Respondent (before this Court) 3-8, 11-12.

But the Fifth Circuit's error here is more fundamental. That court made no attempt to evaluate whether the prosecutors' assertedly race-neutral reasons for striking African-American venire members might in reality have been based on racial considerations. Instead, the court stated that "once we have identified the reasons for the strikes, the credibility of the reasons is *self-evident*." App. 11a (emphasis added). But this Court remanded this case for the Fifth Circuit to evaluate the evidence supporting petitioner's claim, including the evidence that similarly situated white jurors were not struck, specifically because the credibility of the prosecutors' reasons was *not* "self-evident." *Id.* at 40a (whether prosecutors' reasons were pretexts for discrimination is debatable).

In reaching that conclusion, this Court found that "[i]n this case, three of the State's proffered race-neutral ration-

ales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury." App. at 39a-40a (ambivalence about the death penalty, hesitancy to impose the death penalty on those who could be rehabilitated, and the jurors' own family history of criminality). The Fifth Circuit flatly ignored that finding and held, on precisely the same record, that "there were no unchallenged non-black venire members similarly situated" to the struck African-Americans." *Id.* at 11a.

The Fifth Circuit's ultimate conclusion that there was no purposeful discrimination in petitioner's jury selection, therefore, rested on two erroneous findings: that the credibility of the prosecutors' reasons for striking African-American venire members was "self-evident," and that there were no unchallenged non-black venire members situated similarly to the struck African-Americans. Both of these findings directly contravene this Court's opinion.

In any event, the evidence in the record also contradicts the court of appeals' characterization of the *voir dire*. Although space limitations preclude a full refutation of the State's and Fifth Circuit's characterization of the *voir dire*, some examples are illustrative. The Fifth Circuit's treatment of African-American venireperson Billy Fields is typical. The court of appeals credited the State's assertion that "[t]he prosecution exercised a peremptory challenge to remove Fields, citing its concern that his deeply held religious belief in the rehabilitative capacity of all persons could impact his willingness to impose a death sentence and the fact that his brother had been convicted of a felony." App. at 12a. The record shows, however, that, if anything, Fields was more supportive of the death penalty than white jurors whom the State found qualified, and that his religious beliefs buttressed that support.

Fields expressed unambiguous support for the death penalty on his questionnaire, and then wrote "[i]f you commit the crime pay the pen[alt]y." *See* Reply Brief for Petitioner 2, *Miller-El* v. *Cockrell*, No. 01-7662 (U.S. 2002) (alteration in original). Although Fields believed that every-

one can be rehabilitated, he made it clear that he would vote for the death penalty *even* for someone who could be rehabilitated. JA 118-119. Fields' religious faith in fact led him to *strongly support* capital punishment: "According to the Old Testament, people were killed if they violated His law. In its extended service, the State represents Him if the crime has been committed and death is warranted." JA 108. Fields then explained that in his view "the State is God's extended person" and "if the State exacts death, then that's what it should be." JA 108. It is difficult to imagine a more pro-State juror than one who views the State as "God's extended person."

In contrast, seated white juror Sandra Hearn expressly stated that her support for the death penalty *depended* on whether the defendant could be rehabilitated. JA 694 ("I believe in the death penalty *if* a criminal cannot be rehabilitated and continues to commit the same type of crime. I do not think anyone should be sentenced to a death penalty on [a] first offense." (emphasis added)).[3] If anything, it was the seated white juror's views on rehabilitation that were likely to have an impact on her willingness to impose the death penalty.

With the white juror, however, the Fifth Circuit looked beyond her comments about rehabilitation and explored her *voir dire* for other attributes that made her a strong State's juror. Hearn was a strong State's juror and petitioner's trial counsel tried to remove her, a fact that caused the panel to label petitioner's arguments as somehow "disingenuous." App. 15a. But Fields' *voir dire* indicated that he was also a strong State's juror; he was a conservative, deeply religious, middle-aged family man with deep roots in the community

[3] White juror Kevin Duke also expressed strong views about the virtues of rehabilitation. When questioned about a law that would permit a convicted murderer to be eligible for parole in just two years, Duke responded: "I think it's a good one. If they've changed within those two years and they can be a responsible human being and live in society, I see nothing wrong with it .... I believe in forgiving." JA 587.

and strong, pro-death penalty views. JA 125-127. The Fifth Circuit's conclusion that he was struck because of his views on rehabilitation finds no support in the record.

According to the court of appeals, Fields was also properly struck because he had a family member with a criminal history. App. 12a. But when the prosecution asked Fields about the incarceration of his brother, Fields responded, "I don't really know too much about it." JA 124, 133-134. When asked whether his brother's trouble with the law "would in any way interfere with [his] service on this jury," Fields unhesitatingly said, "No." JA 124. The State's treatment of Fields contrasts sharply with that of Noad Vickery, a white venireperson who was accepted by the State and struck by the defense. Like Fields, Vickery was unsure of the details of his sibling's incarceration. But unlike Fields, Vickery hesitated when asked whether it would interfere with his service on the jury:

> Q: Would that affect your ability to serve as a juror in this case?
>
> A: I don't think so, no.
>
> Q: You keep on saying "I don't think so." When you say I don't think so, you're saying that's no?
>
> A: No, it would not, I'm sorry.

JA 435-436. If anything, Vickery's hesitations made him a less attractive juror, and if concern about a family member's criminal history motivated the prosecutors' strike of Fields, it should have similarly subjected Vickery to a prosecution strike.[4]

[4] The Fifth Circuit attempted to justify the prosecution's disparate treatment of potential jurors who had a family member with a criminal history with distinctions based on the particular circumstances of the relative's criminal episode. App. 17a. But such distinctions were not made by the prosecutors at the time, and cannot now be used to rationalize the prosecutors' motives. The prosecutors for the most part failed even to ask questions on the subject when potential jurors revealed a family member with a criminal history. For example, three African-American venire members were struck by the prosecution for the proffered reason that each had relative with a criminal history. However, four white jurors had a relative with a criminal history and were accepted by the State. Of these seven jurors, the State questioned only two (one white and one African-American, Fields) about this issue.

The Fifth Circuit faulted petitioner for "fail[ing] to identify any unchallenged non-black venire member similarly situated" to the *Batson* jurors because there were allegedly no white seated jurors who shared the same combination of characteristics as the African-American jurors who were excluded by the State. App. 18a. But this Court specifically found, on the same record, that "three of the State's proffered reasons for striking African-American jurors pertained just as well to some white jurors who were not challenged" and who served on the jury (App. 40a).

What is more, petitioner did identify such similarly situated jurors. For example, white venireperson Vickery expressed the precise combination of reasons the State used to justify striking Fields. In addition to having a relative with a criminal history, Vickery also expressed ambivalence about the death penalty and hesitancy about imposing it.[5] And even the concurring and dissenting Justices on this Court conceded that "petitioner has shown that one of these African-American veniremen (Rand) may have been no more ambivalent about the death penalty than white jurors Hearn and Mazza." App. 49a (Scalia, J., concurring); *see also* App. 58a-59a (Thomas, J., dissenting). Ambivalence about

[5] Inquiring into Vickery's feelings about the death penalty, the prosecution asked him whether, if he were governor for a day, he would keep or abolish the death penalty. Vickery responded: "I really don't know how I feel about it, to be honest with you. I think possibly it is something that is required, but then again, as a human being, it's hard to say that you want to see someone die. I honestly can't tell you, you know, how I feel." App. 67a. Mr. Vickery was also asked whether he himself could apply the death penalty in a specific case, and again gave a far from resounding answer: "I think I can make a decision [if placed on a sentencing jury]. I don't think it would affect me mentally or physically. I don't think it would be a decision that I would want to make and I don't particularly want to make it, but I think I could." App. 67a-68a.

the death penalty was the sole reason proffered for striking Edwin Rand. In short, the prosecution accepted white jurors who were similarly situated to African-Americans that were peremptorily removed, and there is no credible explanation for their having done so other than race.

II. This Case Is Of Paramount Importance

In addition to directly contradicting several of this Court's specific conclusions, the Fifth Circuit's entire approach to the *Batson* step-three analysis, and by extension to the analysis under § 2254, is fundamentally flawed. Its denial of relief on the merits simply repeats the errors it committed in denying the COA, by failing to fully consider all the relevant evidence and by accepting "without question" the state court's credibility determinations.

The opinion below thereby not only undermines this Court's supervisory authority, but it also interprets this Court's precedents for applying *Batson* and § 2254 in a manner that deprives both of meaning. The evidence that white jurors who were not peremptorily struck were similarly situated to African-American venire members who were—along with the evidence of the history of discrimination in jury selection in Dallas County, the use of jury shuffles and disparate questioning to manipulate the racial composition of the jury, and the fact that one of the prosecutors in this case had previously committed a *Batson* violation—all shed light on the credibility of the prosecutors' proffered rationales and whether those rationales were pretexts for discrimination. Yet despite this Court's explicit guidance, the Fifth Circuit failed to consider this and other evidence, in substance if not in form. *See, e.g., Kyles* v. *Whitley*, 514 U.S. 419, 440-441 (1995) (despite Fifth Circuit's assurance that it had considered "all" evidence relevant to *Brady* materiality analysis, this Court finds that the Fifth Circuit actually "dismiss[ed] *particular* items of [*Brady*] evidence as immaterial," an approach which added up to a "series of *independent* materiality evaluations, rather than the cumulative evaluation" required by precedent) (emphasis added); *Banks* v. *Dretke*, 124 S. Ct. 1256, 1270, 1276 (2004) ("[T]he Fifth Circuit ... concluded ... [that] Farr's status as an informant was not 'materia[l]' for *Brady* purposes.... Our touchstone on materiality is *Kyles v. Whitley*, ... [which] instructed that the materiality standard for *Brady* claims is met when 'the favorable evidence could reasonably be taken to put *the whole case* in such a different light as to undermine confidence in the verdict'" (emphasis added)); *Williams* v. *Taylor*, 529 U.S. 362, 397-398 (2000) (faulting state court for failing to consider "totality" of the evidence in evaluating prejudice caused by counsel ineffective assistance).

It is of paramount importance for this Court to take this case, therefore, both to affirm its supervisory authority over the lower courts and to vindicate the very purpose for its original grant of certiorari—to provide guidance to the lower courts as to the proper way to evaluate evidence under *Batson* such that its protections do not become a "vain and illusory" promise. Equally important, and closely related, is the need for this Court to provide guidance to the lower courts as to the proper evaluation of evidence under the standards of §§ 2254(d)(2) and (e)(1). This question pervades federal habeas practice. If the Fifth Circuit's decision—in which it accepted "without question" the state court's evaluation of the prosecutors' credibility—is allowed to stand, then the standards under § 2254 for reviewing state-court decisions based on factual determinations will be nullified.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2253(c) of Title 28, United States Code, provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Sections 2254(d) and (e)(1) of Title 28, United States Code, provide:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

APPENDIX B

United States Court of Appeals
Fifth Circuit

Thomas Joe MILLER-EL,
Petitioner-Appellant,

v.

Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent-Appellee.

No. 00-10784

Feb. 26, 2004

Appeal from the United States District Court
for the Northern District of Texas

[2004 WL 352542]

Before DAVIS, JONES and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

[1] Petitioner brings this federal habeas corpus petition claiming, pursuant to *Batson* v. *Kentucky*, that the state trial court erred in finding that there was no purposeful discrimination in the selection of his jury. The district court denied Petitioner relief. The district court then denied a certificate of appealability ("COA"). Petitioner previously appealed to this court and we denied a COA. The Supreme Court reversed. We then granted COA and now address the merits of Petitioner's appeal.

BACKGROUND

On November 16, 1985, Thomas Jo Miller-El, his wife, and Kenneth Flowers robbed a Holiday Inn in Dallas, Texas. During the robbery two employees, Doug Walker and Don-

ald Hall, were ordered to lie on the floor, gagged with strips of fabric, and their hands and feet were bound. Miller-El shot Walker twice in the back and shot Hall in the side. Walker died from his wounds.

The state indicted Miller-El for capital murder. He pleaded not guilty, and jury selection took place during five weeks in February and March 1986. When *voir dire* had been concluded, Miller-El moved to strike the jury on the grounds that the prosecution had violated the Equal Protection Clause of the Fourteenth Amendment by excluding blacks through the use of peremptory challenges. Miller-El's trial occurred before the Supreme Court's decision in *Batson* v. *Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Therefore, *Swain* v. *Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), was then the controlling precedent. As *Swain* required, Miller-El sought to show that the prosecution's conduct was part of a larger pattern of discrimination aimed at excluding blacks from jury service. In a pretrial hearing held on March 12, 1986, Miller-El presented evidence in support of his motion. The trial judge, however, found "no evidence . . . that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office; while it may have been done by individual prosecutors in individual cases." The state court then denied Miller-El's motion to strike the jury. Twelve days later, the jury found Miller-El guilty; and the trial court sentenced him to death.

Miller-El appealed to the Texas Court of Criminal Appeals. While the appeal was pending, on April 30, 1986, the Supreme Court issued its opinion in *Batson* v. *Kentucky* and established a three-part process for evaluating claims that a prosecutor used peremptory challenges in violation of the Equal Protection Clause. 476 U.S. at 96-98, 106 S.Ct. 1712. First, a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race. *Id.* at 96-97, 106 S.Ct. 1712. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. *Id.* at 97-98, 106 S.Ct. 1712. Third, in light of the parties' submissions, the trial court

must determine whether the defendant has shown purposeful discrimination. *Id.* at 98, 106 S.Ct. 1712.

After acknowledging Miller-El had established an inference of purposeful discrimination, the Texas Court of Criminal Appeals remanded the case for new findings in light of *Batson*. *Miller-El* v. *State*, 748 S.W.2d 459, 461 (Tex.Crim.App.1988)(en banc). A post-trial hearing was held on May 10, 1988. There, the original trial court admitted all the evidence presented at the *Swain* hearing and further evidence and testimony from the attorneys in the original trial.

[2] On January 13, 1989, the trial court concluded that Miller-El's evidence failed to satisfy step one of *Batson* because it "did not even raise an inference of racial motivation in the use of the state's peremptory challenges" to support a *prima facie* case. Notwithstanding this conclusion, the state court determined that the state would have prevailed on steps two and three because the prosecutors had offered credible, race-neutral explanations for each black venire member excluded. The court further found "no disparate prosecutorial examination of any of the venire [members] in question" and "that the primary reasons for the exercise of the challenges against each of the venire [members] in question [was] their reluctance to assess or reservations concerning the imposition of the death penalty."

The Texas Court of Criminal Appeals denied Miller-El's appeal, and the Supreme Court denied certiorari. *Miller-El* v. *Texas*, 510 U.S. 831, 114 S.Ct. 100, 126 L.Ed.2d 67 (1993). Miller-El's state habeas proceedings fared no better, and he was denied relief by the Texas Court of Criminal Appeals.

Miller-El filed a petition for writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254.[1] The federal magistrate judge who considered the merits of the *Batson* claim recommended, in deference to the state court's acceptance of the prosecutors' race-neutral justifications for striking the potential jurors, that Miller-El be denied relief. The United States district court adopted the recommendation. Pursuant to 28 U.S.C. § 2253, Miller-El sought a COA from the district court, and the application was denied. Miller-El renewed his request to this Court, and we also denied a COA. Miller-El appealed to the Supreme Court and certiorari was granted. 534 U.S. 1122, 122 S.Ct. 981, 151 L.Ed.2d 963 (2002). In an opinion issued on February 25, 2003, the Supreme Court concluded based on a "threshold examination" of the record, that the federal district court's rejection of Miller-El's *Batson* claim was "debatable" and thus we had erred in not granting COA on Miller-El's *Batson* claim. *Miller-El* v. *Cockrell*, 537 U.S. 322, 347-48, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). The Supreme Court remanded the case to this Court to determine whether Miller-El can "demonstrate that [the] state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court." *Id.* at 348, 123 S.Ct. 1029. We granted COA for precisely that determination. *Miller-El* v. *Johnson*, 330 F.3d 690 (5th Cir.2003)(per curiam).

[1] Although Miller-El raised four issues, the petition has been narrowed down by the Supreme Court to only the jury selection claim premised on Batson. *See Miller-El* v. *Cockrell*, 537 U.S. 322, 329, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

DISCUSSION

[3] Claims of racial discrimination in jury selection are evaluated according to the framework established in *Batson* v. *Kentucky*, which requires a three-step analysis that shifts the burden of production between the parties. 476 U.S. at 96-98, 106 S.Ct. 1712. First, the defendant must make a prima facie showing that the prosecution has exercised peremptory challenges on the basis of race. *Id.* at 96-97, 106 S.Ct. 1712. Second, if the requisite showing has been made, the burden shifts to the prosecution to provide a race- neutral explanation for striking the venire member in question. *Id.* at 97-98, 106 S.Ct. 1712. Third, the defendant again has the burden, this time of proving purposeful discrimination.

Id. at 98, 106 S.Ct. 1712. Under *Batson*, the ultimate burden of persuading the court that the state's peremptory challenges are attributable to a discriminatory purpose lies with and never shifts from the defendant. *Id.* at 94 n. 18, 106 S.Ct. 1712 (citing *Tex. Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 252-56, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)); *Purkett* v. *Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995).

In the present case, there is no dispute that Miller-El presented a *prima facie* claim under *Batson*'s first step. Nor is there any dispute that the prosecution presented facially race-neutral reasons for exercising each peremptory challenge. The only issue is Miller-El's disagreement with the trial court's determination at *Batson*'s third step that Miller-El had failed to show that the prosecution's reasons for exercising the challenged peremptory strikes were not credible and Miller-El had not demonstrated that purposeful discrimination had occurred. The federal district court has already determined on habeas review that Miller-El has failed to show that the state court erred, and therefore is not entitled to habeas relief. Miller-El is now appealing this determination and COA has been granted. Therefore we now address the merits of Miller-El's appeal.

Under the current scheme for habeas review in federal court, which was substantially updated in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(e)(1) requires that we "presum[e]" the state court's findings of fact "to be correct" unless Miller-El can rebut the presumption "by clear and convincing evidence."[2] As the Supreme Court has stated, the state court's finding at step three of Miller-El's *Batson* claim was a finding of fact

[2] The language of § 2254(e)(1) could not be clearer:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

and therefore subject to § 2254(e)(1)'s presumption of correctness. Miller-El, 537 U.S. at 339, 123 S.Ct. 1029 (citing *Hernandez* v. *New York*, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), for the proposition that the determination made at step three of *Batson* is a " 'pure issue of fact' accorded significant deference").

We follow the lead of the Supreme Court in utilizing their decisions in *Hernandez* v. *New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), and *Purkett* v. *Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), to guide our decision regarding the trial court's finding of no purposeful discrimination at step three in this *Batson* claim. These Supreme Court opinions state that the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness and credibility of the prosecutor's justification for his peremptory strike. *Purkett*, 514 U.S. at 768, 115 S.Ct. 1769; *Hernandez*, 500 U.S. at 364-65, 111 S.Ct. 1859. Further, these cases, applying a standard of review even less deferential to the trial court's finding than we are required to apply under AEDPA, articulate that deference is necessary because the reviewing court is not as well positioned as the trial court to make credibility determinations, and once the trial court has made a credibility determination concerning the prosecutor's state of mind regarding the peremptory strikes, the step three determination under *Batson* has been decided. *Purkett*, 514 U.S. at 768, 115 S.Ct. 1769 (citing 28 U.S.C. § 2254(d)(8) and stating that the standard of review for a federal habeas claim required that the factual findings of the state court be presumed to be correct, and "may be set aside, absent procedural error, only if they are 'not fairly supported by the record' "); *Hernandez*, 500 U.S. at 366-67, 111 S.Ct. 1859 (applying, on direct review of a state court's factual findings, a "clearly erroneous" standard).

[4] Miller-El argues that the state court's finding of the absence of purposeful discrimination was incorrect and the corresponding factual determinations were "objectively unreasonable" in light of the following four areas of evidence

that he claims were before the court. First, evidence of historical discrimination by the Dallas County District Attorney's office in the selection of juries. Second, the use of the "jury shuffle" tactic by the prosecution. Third, the alleged similarity between non-black venire members who were not struck by the prosecution and six blacks who were. Fourth, evidence of so-called disparate questioning with respect to venire members' views on the death penalty and their ability to impose the minimum punishment.

First, Miller-El argues that he presented evidence of the Dallas County District Attorney's office "unofficial policy" of excluding blacks from jury service. Some of this evidence was first presented in the *Swain* hearing conducted by the trial court. When Miller-El's counsel attempted to reintroduce this historical evidence at the post-trial *Batson* hearing, the prosecution objected, arguing that even if accurate the evidence was irrelevant under *Batson*. The court admitted the evidence but reserved the right to give it no weight.

As the United States magistrate judge found, there was considerable evidence that the Dallas County District Attorney's office had an unofficial policy of excluding blacks from jury service and that this evidence was disturbing. The district court accepted this finding. But both the magistrate and district court noted that the historical evidence, however disturbing, is not determinative of whether there was purposeful discrimination in the selection of Miller-El's jury. We also note that the apparent culture of discrimination that existed in the past in the Dallas County District Attorney's Office and the individual discriminatory practices that may have been practiced during the time of Miller-El's jury selection by some prosecutors are deplorable. The Supreme Court stated that proof "that the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection" is "relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions" in Miller-El's case. *Miller-El*, 537 U.S. at 347, 123 S.Ct. 1029. In this case, however, the relevancy of this evidence is less significant because Miller-El has already met the burden under the first step of *Batson* and now must prove actual pretext in his case. This historical evidence is relevant to the extent that it could undermine the credibility of the prosecutors' race-neutral reasons. Here, however, as explained below the race-neutral reasons are solidly supported by the record and in accordance with the prosecutors' legitimate efforts to get a jury of individuals open to imposing the death penalty. The state court, in the best position to make a factual credibility determination, heard the historical evidence and determined the prosecutors' race-neutral reasons for the peremptory strikes to be genuine. Under our standard of review, we must presume this specific determination is correct and accordingly the general historical evidence does not prove by clear and convincing evidence that the state court's finding of the absence of purposeful discrimination in Miller-El's jury selection was incorrect.

[5] Second, Miller-El argues that the state court erred in not finding purposeful discrimination based on the use of the "jury shuffle" tactic by the prosecution. The record, however, clearly establishes that Miller-El shuffled the jury five times and the prosecutors shuffled the jury only twice. Again, Miller-El's circumstantial evidence of jury shuffles does not overcome the race-neutral reasons for exercising the challenged peremptory strikes articulated by the prosecutors and accepted by the state court who observed the *voir dire* process including the jury shuffles.

Third, Miller-El argues that there were similarities between non-black venire members who were not struck by the prosecution and six blacks who were. Miller-El maintains that the following six black venire members were victims of racially motivated peremptory strikes: Roderick Bozeman, Billy Jean Fields, Joe Warren, Edwin Rand, Carrol Boggess, and Wayman Kennedy.

As to each of the black venire members Miller-El claims were the victims of racially motivated peremptory strikes, it is important to identify the prosecution's stated reasons for

exercising a peremptory challenge. Once we have identified the reasons for the strikes, the credibility of the reasons is self-evident. Further, we can determine from the record that there were no unchallenged non-black venire members similarly situated, such that their treatment by the prosecution would indicate the reasons for striking the black members were not genuine. [3]

[6] Roderick Bozeman stated that while he believed in the death penalty as a general proposition, he thought it was only appropriate "if there's no possible way to rehabilitate a person." If Bozeman thought there was a chance of rehabilitation, he did not think the death penalty was appropriate. He said that a "mentally disturbed" person and "a Manson type" were examples of someone who could not be rehabilitated. He said, however, that repeated criminal acts of violence would not necessarily indicate that a person was beyond rehabilitation. Bozeman classified himself as the type of person who believed in the death penalty in principle, but who could not actually serve on a capital jury. He verified his inability to impose the death penalty by stating that even if the evidence compelled "yes" answers to the special issues posed to the jury at the punishment stage, he might refuse to answer the questions honestly in order to avoid imposing the death penalty. The prosecution exercised a peremptory challenge to remove Bozeman, citing his views on the death penalty and on rehabilitation, his belief that a pattern of violent conduct would not be sufficient to render a defendant deserving of death, and his "obvious hesitation" concerning his ability to override his personal feelings and answer the special issues according to the evidence.

Venire member Billy Jean Fields stated that he believed in the death penalty and could serve on a capital jury.

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[3] With the exception of black venire members Joe Warren and Paul Bailey, the prosecution set forth its race-neutral reasons for exercising the peremptory challenges immediately after exercising the strikes. At the subsequent *Batson* hearing the court took judicial notice of that prior testimony in the *voir dire* record. Miller-El has not based his claim on the prosecution striking Bailey.

However, after being informed that the possibility of rehabilitation would be a factor he would need to consider in assessing whether to impose the death penalty, Fields proclaimed that his religious belief was that no one was beyond rehabilitation. Fields stated, "I f[illegible]ike, if a person has the opportunity to really be talked [t[illegible] about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation." He further stated, "when an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated." Additionally, Fields indicated in his questionnaire and in response to questions by the prosecution that his brother had been incarcerated numerous times for drug offenses. The prosecution exercised a peremptory challenge to remove Fields, citing its concern that his deeply held religious belief in the rehabilitative capacity of all persons could impact his willingness to impose a death sentence and the fact that his brother had been convicted of a felony.

Venire member Joe Warren answered questions during *voir dire* in a noncommital manner and indicated ambivalence about the death penalty and his ability to impose it. He stated, "there are some cases where I would agree [with the death penalty], you know, and there are others that I don't." When the prosecution described the crimes defined as capital murder under Texas law and asked whether Warren felt the death penalty could be an appropriate punishment for such crimes, he responded, "Well, there again, I would say it depends on the case and the circumstances involved at the time." When asked whether the death penalty serves a purpose, Warren answered, "Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that." When asked whether he could make a decision between a life sentence and a death sentence, Warren answered, "I think I could." When questioned about his ability to answer the future dangerousness special issue question, Warren responded, "I suppose there's always a chance, but there again, you never know." Finally,

Warren stated, "Well, it[']s just like I said you know. There are cases, I mean, personally, that I feel I wouldn't want to personally be, you know, involved with it if I had a choice." The prosecution exercised a peremptory challenge to remove Warren. Miller-El's counsel did not object to the peremptory strike against Warren contemporaneous to the strike, therefore the prosecution did not give its race-neutral reasons at *voir dire*. At the *Batson* hearing, the prosecutor cited Warren's hesitation about imposing the death penalty and his inconsistent responses during *voir dire* as the reasons for striking him. The prosecutor also noted that Warren was struck relatively early in the jury selection process when the state had ten challenges remaining before exercising one to remove Warren. The prosecutor noted at the *Batson* hearing that an attorney's strategy regarding the use of peremptory challenges necessarily changes as jury selection progresses and peremptory challenges either remain unused or get used more rapidly. In fact, the prosecutor on cross-examination at the *Batson* hearing admitted that he would have struck non-black jurors Sandra Hearn and Fernando Gutierrez, who also gave somewhat ambivalent answers regarding the death penalty, before Warren, had they come up earlier in the process.

[7] Venire member Edwin Rand described capital punishment as a "touchy subject" during *voir dire* but did indicate on his questionnaire that he believed in the death penalty. In response to several alternative choices put to him by the prosecution, Rand described himself as a person who may or may not be able to impose the death penalty. He said, "Somewhere along the line, I would probably think to myself, you know, 'Can I do this?' You know, right now I say I can, but tomorrow I might not." The prosecution exercised a peremptory challenge to remove Rand, citing his ambivalence about the death penalty generally and his lack of ability to serve on a capital jury.

Venire member Carrol Boggess indicated on her questionnaire that she had a moral, religious, or personal belief that would prevent her from imposing the death penalty.

During *voir dire* she stated, "Well, I believe I could serve on a case like this, but whether I want to or not is a different thing. I wouldn't want to serve and I wouldn't want to have that responsibility to do that, but if it fell upon me, I would certainly take it and pray to the Lord to help me get through it." Later she stated, "I'm not saying that I feel like I could impose the sentence myself--or I'm not going to be imposing the sentence, is that correct?" When directly asked whether she could vote for a death sentence, she stated, "I've never been in that situation. I don't feel like I would want to be in that situation and whether I could do it or not, I'm not real sure." She continued by stating "whether or not I could actually go through with murder--with killing another person or taking another person's life, I just don't know. I'd have trouble with that." Boggess also indicated that she had testified as a defense witness at her nephew's theft trial. The prosecution exercised a peremptory challenge to remove Boggess, citing as reasons for the strike her hesitancy about assessing a death sentence and the fact that she had served as a defense witness in her nephew's trial.

[8] Venire member Wayman Kennedy stated on his questionnaire he believed in the death penalty "only in extreme cases." On *voir dire* he stated that he believed in the death penalty only for mass murders or cases involving mutilation. Kennedy stated he did not think a murder in the course of a robbery would necessitate the death penalty because "why wouldn't a life sentence be enough." Finally, when asked whether he could answer the special issues "yes" if proved beyond a reasonable doubt, even if he personally felt the defendant should not be sentenced to death, Kennedy replied, "I think I could." The prosecution exercised a peremptory challenge to remove Kennedy, citing his hesitancy to assess the death penalty for murder in the course of robbery, the crime Miller-El was accused of, his view that the death penalty was only appropriate in extreme cases, and his hesitancy in stating that he could answer the special issues according to the evidence.

Miller-El claims that three non-black venire members, Sandra Hearn, Marie Mazza, and Ronald Salsini, expressed views about the death penalty as ambivalent as those expressed by Bozeman, Fields, Warren, Rand, Boggess, and Kennedy, but the three non-black venire members were not struck by the prosecution. The record, especially the *voir dire* transcript, does not support this assertion.

Sandra Hearn stated in her jury questionnaire and on *voir dire* that she believed in the death penalty and could assess it in appropriate cases. She did express the belief that someone should not be sentenced to death on a first offense but if the person had committed any prior offense including robbery or some other criminal act of violence the death penalty would be appropriate. The evidence admitted at the punishment phase of Miller-El's trial indicated he had committed two previous armed robberies and one also involved a kidnaping. Hearn also stated she thought the death penalty should be available for more than just murder but also severe torture and extreme child abuse. She indicated that she had respect for law officers, that her father was a retired FBI agent, and that she had daily contact with police officers in her employment. Miller-El's counsel must have believed Hearn was a pro-prosecution venire member because he attempted to have her challenged for cause on numerous grounds, and when the trial judge found Hearn qualified, Miller-El's counsel requested an additional peremptory strike in order to remove her. In fact, on direct appeal Miller-El continued to argue that the trial court erred in denying his challenge for cause of Hearn, so it seems disingenuous to argue now that she was similarly situated to the black jurors who expressed reservations about imposing the death penalty.

Venire member Maria Mazza indicated on her juror questionnaire that she believed in the death penalty. When asked about her feelings on the death penalty at *voir dire*, she stated, "It's not an easy one and I feel that it depends upon the case, the testimony.... It's kind of hard determining somebody's life, whether they live or die, but I feel that is

something that is accepted in our courts now and it is something that--a decision that I think I could make one way or the other." Mazza served on Miller-El's jury.

[9] Venire member Ronald Salsini stated he believed in the death penalty and that he could impose the death penalty. He did indicate imposing the death penalty would be difficult; however, he gave a hypothetical crime based on his personal experience as a bank teller that closely paralleled the crime Miller-El was charged with and stated that such a criminal act was deserving of the death penalty. The prosecution did not strike Salsini but Miller-El's counsel did.

Comparing the views expressed by Hearn, Mazza, and Salsini to the views expressed by the challenged black venire members, it is clear that Hearn, Mazza, and Salsini were not similarly situated for several reasons. First, ambivalence about the death penalty was not the sole reason for striking Bozeman, Fields, or Boggess. Second, Warren, Rand, and Kennedy were struck mainly because of ambivalence about the death penalty, but they each also expressed doubts about whether they personally could impose the death penalty even if the evidence indicated the death penalty was appropriate. This was not the case with Hearn, Mazza, and Salsini. Third, Warren refused to give a clear answer as to whether or not he could impose the death penalty if the evidence warranted it. Fourth, Kennedy stated the death penalty should be limited to extreme cases. Finally, Rand's ambivalence was less pronounced and more in line with the uncertainty expressed by Hearn and Mazza, although Rand still indicated he was uncertain as to whether he could impose the death penalty. Under our federal habeas standard of review, however, Miller-El has not shown by clear and convincing evidence that the trial court, who observed the *voir dire* process, erred in finding the prosecution's reason for striking Rand or the other black venire members credible.

Next, Miller-El claims non-black unchallenged venire members Hearn and Kevin Duke expressed views on rehabilitation similar to the views expressed by the black chal-

lenged venire members. Hearn's views have already been discussed. Duke expressed support for the death penalty and said he could impose it. Duke made comments concerning rehabilitation in the context of the availability of parole, not in the context of whether the death penalty was appropriate. Duke served on Miller-El's jury.

Again, the record does not support Miller-El's assertion. While the prosecution only cited views concerning rehabilitation as grounds for striking Bozeman and Fields, that was not the sole basis for exercising those strikes. As previously noted, Bozeman's and Fields' views on rehabilitation were much stronger than Hearn's and Duke's. Hearn and Duke were not similarly situated to any challenged black venire members.

Finally, Miller-El asserts that non-black venire members Noad Vickery, Cheryl Davis, Chatta Nix, and Joan Weiner were similarly situated to challenged black venire members who had family members with a criminal background. When Vickery was fifteen his sister had been arrested and served time in California. Vickery was a strong state juror and after unsuccessfully attempting to have him struck for cause, Miller-El used one of his preliminary strikes to remove Vickery. Davis' husband had been convicted of theft ten years earlier. Davis was a strong state juror and Miller-El attempted to have her struck for cause but was unsuccessful. Therefore, Miller-El used one of his preliminary strikes to remove her. Nix's brother entered a guilty plea in a high profile white-collar crime case. Nix, who served as an office manager for her brother's construction company, had been named in several civil suits relating to the white-collar crime issues. Nix was a strong prosecution juror and Miller used one of his preliminary strikes to remove her from the panel. Weiner's ten-year- old son had once been arrested for shoplifting. Weiner served on Miller-El's jury.

[10] Again, the record does not support Miller-El's *Batson* claim. The prosecution only cited a family member with criminal history as grounds for striking Boggess and Fields.

Furthermore, that was not the sole basis for striking either Boggess or Fields. In summary, Miller-El has failed to identify any unchallenged non-black venire member similarly situated to the six struck black venire members on whom he is basing his *Batson* claim. Therefore, he has failed to demonstrate by clear and convincing evidence that the state court erred in finding the prosecution's reasons for exercising its preliminary challenges credible.

Fourth, Miller-El also argues that the prosecution posed different questions concerning the death penalty and the minimum allowable punishment to the venire members depending on the race of the venire member. The record, however, reveals that the disparate questioning of venire members depended on the member's views on capital punishment and not race. The prosecution used questioning to either ferret out a venire member's views on the death penalty or to establish a basis to disqualify venire members who had unfavorable views but were not subject to disqualification on those grounds.

One hundred and eight venire members survived the initial round of hardship excuses. The court excused three members for cause prior to *voir dire* and the parties agreed to remove thirty-nine others, including five blacks. Thus, a total of sixty-six venire members were subject to full *voir dire*, including fifty-one non-blacks and fifteen blacks.

The prosecution questioned all venire members concerning their views of the death penalty. A majority of the venire members were informed the state was seeking the death penalty and that affirmative answers to three questions submitted to the jury at the punishment phase would result in Miller-El being sentenced to death, and then asked about their views concerning the death penalty. Prosecutors did utilize a "graphic script" to describe an execution in detail to some venire members. Both black and non-black venire members who had expressed reservations never received the script. However, all black venire members given the graphic script had expressed some level of reservations about the death penalty in their juror questionnaires including Boggess, Kennedy, Bailey, Linda

ing Boggess, Kennedy, Bailey, Linda Baker, Troy Woods,[4] Janice Mackey, Anna Keaton, and Jeanette Butler.[5] Some of the non-black venire members questioned with the graphic script expressed reservations including Dominick Desinise and Clara Evans. Non-black venire member Vivian Sztybel did not express reservations about the death penalty yet still received the graphic script. Sztybel was ultimately seated on Miller-El's jury.

Miller-El contends that there were ten black venire members who expressed reservations and seven of these venire members, who were ultimately peremptory challenged by the prosecution, got the script, while there were ten non-black venire members who expressed reservations but only two got the script. Miller-El argues this disparity proves purposeful discrimination and therefore the trial court erred. A review of precisely what the prosecution did in terms of *voir dire* questioning indicates the trial court, who observed the *voir dire* process, did not err in finding there was no purposeful discrimination.

[11] The jury questionnaire asked two questions directly relevant to the death penalty. Question 56 asked, "Do you believe in the death penalty?" Venire members could circle "yes" or "no," and then they were asked to "[p]lease explain your answer." Question 58 allowed venire members to circle "yes" or "no" in answering the following question: "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?"

Presumably, the eight non-blacks who did not receive the graphic script, but Miller-El thinks should have, answered "no" to question 56 and answered to "yes" to question 58. Questioning on *voir dire* also indicates there was no uncertainty as to the views of these eight non-black venire members. They were so opposed to the death penalty there was no need to give them a detailed description in order to find out their thoughts; in fact, a detailed description may have simply antagonized them and turned them off to the prosecutors. In fact, of these eight, five were removed for cause because of their views on the death penalty, including John Nelson, Linda Berk, Gene Hinson, Sheila White, and Joyce Willard while one, Leta Girard, was removed by agreement of the parties. The two others also had strong views, making use of the graphic script unnecessary. Margaret Gibson did not believe in the death penalty and the state exercised a peremptory challenge to remove her. James Holtz believed the death penalty was appropriate only if a police officer or fireman was murdered and the state exercised a peremptory challenge to remove him.

[4] Woods' questionnaire did not clearly indicate his views on the death penalty and thus he received the graphic script, but on *voir dire* he indicated that he fully supported the death penalty, the state believed him to be an excellent juror and he was in fact seated on Miller-El's jury.

[5] Jeanette Butler's juror questionnaire is not contained in the record, however, at *voir dire* she stated that she was unwilling to impose the death penalty. Butler was ultimately removed for cause.

The prosecution treated the black venire members no differently. The blacks who did not receive the graphic formulation (whose questionnaires are contained in the record) all answered "yes" to question 56, stating they believed in the death penalty, and "no" to question 58, indicating that their beliefs would not prevent them from imposing a death sentence. This included Bozeman, Fields, Warren, and Rand. The black venire members who were given the graphic formulation, by contrast, gave ambiguous answers on their juror questionnaires expressing a combination of uncertainty and philosophical opposition to the death penalty. Those venire members included Boggess, Kennedy, Baker, Woods, Mackey, Bailey, and Keaton.

In summary, sixteen venire members for whom questionnaire information is available, clearly indicated on the questionnaires their feelings on the death penalty, and fifteen of them did not receive the graphic script. The one who did receive the script was non-black venire member Sztybel. Eight venire members gave unclear answers and those eight venire members received the graphic script. The answers given, not race, accurately indicated whether a venire mem-

ber got the graphic script, and this is confirmation of the prosecution's race-neutral rationale.

[12] The prosecution also did not question venire members differently concerning their willingness to impose the minimum punishment for the lesser- included offense of murder. Different questioning on the minimum sentence issue was used as an effort to get venire members the prosecution felt to be ambivalent about the death penalty dismissed for cause. In making the decision whether to employ what Miller-El argues is a "manipulative" minimum punishment script, prosecutors could rely on both the questionnaires and substantial voir dire testimony, as the minimum punishment questioning occurred much later in *voir dire* than the graphic death penalty questioning.

Seven black venire members were given the allegedly "manipulative" minimum punishment script, all of whom were opposed to the death penalty in varying degrees. These individuals included Rand, Kennedy, Bozeman, Warren, Baker, Boggess, and Fields.

According to Miller-El's argument the prosecution should have used the "manipulative" punishment script on Woods. But Woods gave answers indicating he would be an excellent state's juror and therefore the prosecution had no reason to attempt to have him removed. Had the prosecution sought to eliminate blacks because of race, the use of the "manipulative" script would have been deployed against Woods. But it was not, because the prosecution wanted Woods on the jury.

Likewise, there are no similarly situated non-black venire members who, under the prosecution's rationale, would have been questioned about minimum sentencing. This is true because unless a venire member indicated he would be a poor state's juror and would not otherwise be struck for cause or by agreement, there was no reason to use the "manipulative" script. Thus, of the ten non- black venire members who expressed opposition to the death penalty, eight were struck for cause or by agreement, meaning no "manipulative" script was necessary to get them removed.

Those struck included Desinise, Evans, Nelson, Berk, Hinson, White, Willard, and Girard. The other two non-black venire members Gibson and Holtz were both given the "manipulative" script and peremptorily struck.

In summary, none of the four areas of evidence Miller-El based his appeal on indicate, either collectively or separately, by clear and convincing evidence that the state court erred. Therefore, the district court correctly denied Miller-El habeas relief.

CONCLUSION

Having carefully reviewed the record in this case, the parties' respective briefing and arguments, and for the reasons set forth above, we affirm the decision of the district court in its denial of habeas relief to Miller-El because he has failed to show by clear and convincing evidence that the state court erred in finding no purposeful discrimination.

[13] AFFIRMED.

APPENDIX C

Supreme Court of the United States

Thomas Joe MILLER-EL,
Petitioner,

v.

Janie COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division

No. 01-7662

Argued Oct. 16, 2002
Decided Feb. 25, 2003

[537 U.S. 322]

Justice KENNEDY delivered the opinion of the Court.

In this case we once again examine when a state prisoner can appeal the denial or dismissal of his petition for writ of habeas corpus. In 1986 two Dallas County assistant district attorneys used peremptory strikes to exclude 10 of the 11 African-Americans eligible to serve on the jury which tried petitioner Thomas Joe Miller-El. During the ensuing 17 years, petitioner has been unsuccessful in establishing, in either state or federal court, that his conviction and death sentence must be vacated because the jury selection procedures violated the Equal Protection Clause and our holding in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The claim now arises in a federal petition for writ of habeas corpus. The procedures and standards applicable in the case are controlled by the habeas corpus statute codified at Title 28, chapter 153, of the United States Code, most recently amended in a substantial manner by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). In the interest of finality AEDPA constrains a federal court's power to disturb state-court convictions.

The United States District Court for the Northern District of Texas, after reviewing the evidence before the state trial court, determined that petitioner failed to establish a constitutional violation warranting habeas relief. The Court of Appeals for the Fifth Circuit, concluding there was insufficient merit to the case, denied a certificate of appealability **[327]** (COA) from the District Court's determination. The COA denial is the subject of our decision.

At issue here are the standards AEDPA imposes before a court of appeals may issue a COA to review a denial of habeas relief in the district court. Congress mandates that a prisoner seeking postconviction relief under 28 U.S.C. § 2254 has no automatic right to appeal a district court's denial or dismissal of the petition. Instead, petitioner must first seek and obtain a COA. In resolving this case we decide again that when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. *Slack v. McDaniel*, 529 U.S. 473, 481, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Consistent with our prior precedent and the text of the habeas corpus statute, we reiterate that a prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Slack*, *supra*, at 484, 120 S.Ct. 1595. Applying these principles to petitioner's application, we conclude a COA should have issued.

I

A

Petitioner his wife Dorothy Miller-El, and one Kenneth Flowers robbed a Holiday Inn in Dallas, Texas. They emptied the cash drawers and ordered two employees, Doug Walker and Donald Hall, to lie on the floor. Walker and Hall

were gagged with strips of fabric, and their hands and feet were bound. Petitioner asked Flowers if he was going to kill Walker and Hall. When Flowers hesitated or refused, **[328]** petitioner shot Walker twice in the back and shot Hall in the side. Walker died from his wounds.

The State indicted petitioner for capital murder. He pleaded not guilty, and jury selection took place during five weeks in February and March 1986. When *voir dire* had been concluded, petitioner moved to strike the jury on the grounds that the prosecution had violated the Equal Protection Clause of the Fourteenth Amendment by excluding African-Americans through the use of peremptory challenges. Petitioner's trial occurred before our decision in *Batson*, *supra*, and *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), was then the controlling precedent. As *Swain* required, petitioner sought to show that the prosecution's conduct was part of a larger pattern of discrimination aimed at excluding African-Americans from jury service. In a pretrial hearing held on March 12, 1986, petitioner presented extensive evidence in support of his motion. The trial judge, however, found "no evidence ... that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office; while it may have been done by individual prosecutors in individual cases." App. 813. The state court then denied petitioner's motion to strike the jury. *Ibid.* Twelve days later, the jury found petitioner guilty; and the trial court sentenced him to death.

Petitioner appealed to the Texas Court of Criminal Appeals. While the appeal was pending, on April 30, 1986, the Court decided *Batson v. Kentucky* and established its three-part process for evaluating claims that a prosecutor used peremptory challenges in violation of the Equal Protection Clause. First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. 476 U.S., at 96-97, 106 S.Ct. 1712. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. *Id.*, at 97-98, 106 S.Ct. 1712. Third, in light of the parties' submissions,

the trial court must determine **[329]** whether the defendant has shown purposeful discrimination. *Id.*, at 98, 106 S.Ct. 1712.

After acknowledging petitioner had established an inference of purposeful discrimination, the Texas Court of Criminal Appeals remanded the case for new findings in light of *Batson*. *Miller-El v. State*, 748 S.W.2d 459 (1988). A post-trial hearing was held on May 10, 1988 (a little over two years after petitioner's jury had been empaneled). There, the original trial court admitted all the evidence presented at the *Swain* hearing and further evidence and testimony from the attorneys in the original trial. App. 843-844.

On January 13, 1989, the trial court concluded that petitioner's evidence failed to satisfy step one of *Batson* because it "did not even raise an inference of racial motivation in the use of the state's peremptory challenges" to support a prima facie case. App. 876. Notwithstanding this conclusion, the state court determined that the State would have prevailed on steps two and three because the prosecutors had offered credible, race-neutral explanations for each African-American excluded. The court further found "no disparate prosecutorial examination of any of the veniremen in question" and "that the primary reasons for the exercise of the challenges against each of the veniremen in question [was] their reluctance to assess or reservations concerning the imposition of the death penalty." *Id.*, at 878. There was no discussion of petitioner's other evidence.

The Texas Court of Criminal Appeals denied petitioner's appeal, and we denied certiorari. *Miller-El v. Texas*, 510 U.S. 831, 114 S.Ct. 100, 126 L.Ed.2d 67 (1993). Petitioner's state habeas proceedings fared no better, and he was denied relief by the Texas Court of Criminal Appeals.

Petitioner filed a petition for writ of habeas corpus in Federal District Court pursuant to 28 U.S.C. § 2254. Although petitioner raised four issues, we concern ourselves here with only petitioner's jury selection claim premised on *Batson*. The Federal Magistrate Judge who considered the merits **[330]** was troubled by some of the evidence adduced

in the state-court proceedings. He, nevertheless, recommended, in deference to the state courts' acceptance of the prosecutors' race-neutral justifications for striking the potential jurors, that petitioner be denied relief. The United States District Court adopted the recommendation. Pursuant to § 2253, petitioner sought a COA from the District Court, and the application was denied. Petitioner renewed his request to the Court of Appeals for the Fifth Circuit, and it also denied the COA.

The Court of Appeals noted that, under controlling habeas principles, a COA will issue "'only if the applicant has made a substantial showing of the denial of a constitutional right.'" *Miller-El v. Johnson*, 261 F.3d 445, 449 (2001) (quoting 28 U.S.C. § 2253(c)(2)). Citing our decision in *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000), the court reasoned that "[a] petitioner makes a 'substantial showing' when he demonstrates that his petition involves issues which are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further." 261 F.3d, at 449. The Court of Appeals also interjected the requirements of 28 U.S.C. § 2254 into the COA determination: "As an appellate court reviewing a federal habeas petition, we are required by § 2254(d)(2) to presume the state court findings correct unless we determine that the findings result in a decision which is unreasonable in light of the evidence presented. And the unreasonableness, if any, must be established by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1)." 261 F.3d, at 451.

Applying this framework to petitioner's COA application, the Court of Appeals concluded "that the state court's findings are not unreasonable and that Miller-El has failed to present clear and convincing evidence to the contrary." *Id.*, at 452. As a consequence, the court "determined that the state court's adjudication neither resulted in a decision that **[331]** was unreasonable in light of the evidence presented nor resulted in a decision contrary to clearly established federal law as determined by the Supreme Court," *ibid.*; and it

denied petitioner's request for a COA. We granted certiorari. 534 U.S. 1122, 122 S.Ct. 981, 151 L.Ed.2d 963 (2002).

B

While a COA ruling is not the occasion for a ruling on the merit of petitioner's claim, our determination to reverse the Court of Appeals counsels us to explain in some detail the extensive evidence concerning the jury selection procedures. Petitioner's evidence falls into two broad categories. First, he presented to the state trial court, at a pretrial *Swain* hearing, evidence relating to a pattern and practice of race discrimination in the *voir dire*. Second, two years later, he presented, to the same state court, evidence that directly related to the conduct of the prosecutors in his case. We discuss the latter first.

A comparative analysis of the venire members demonstrates that African- Americans were excluded from petitioner's jury in a ratio significantly higher than Caucasians were. Of the 108 possible jurors reviewed by the prosecution and defense, 20 were African-American. Nine of them were excused for cause or by agreement of the parties. Of the 11 African-American jurors remaining, however, all but 1 were excluded by peremptory strikes exercised by the prosecutors. On this basis 91% of the eligible black jurors were removed by peremptory strikes. In contrast the prosecutors used their peremptory strikes against just 13% (4 out of 31) of the eligible nonblack prospective jurors qualified to serve on petitioner's jury.

These numbers, while relevant, are not petitioner's whole case. During voir dire, the prosecution questioned venire members as to their views concerning the death penalty and their willingness to serve on a capital case. Responses that disclosed reluctance or hesitation to impose capital punishment were cited as a justification for striking a potential **[332]** juror for cause or by peremptory challenge. *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). The evidence suggests, however, that the manner in which members of the venire were questioned varied by race. To the extent a divergence in responses can be at-

tributed to the racially disparate mode of examination, it is relevant to our inquiry.

Most African-Americans (53%, or 8 out of 15) were first given a detailed description of the mechanics of an execution in Texas:

> "[I]f those three [sentencing] questions are answered yes, at some point [,] Thomas Joe Miller-El will be taken to Huntsville, Texas. He will be placed on death row and at some time will be taken to the death house where he will be strapped on a gurney, an IV put into his arm and he will be injected with a substance that will cause his death .. as the result of the verdict in this case if those three questions are answered yes." App. 215.

Only then were these African-American venire members asked whether they could render a decision leading to a sentence of death. Very few prospective white jurors (6%, or 3 out of 49) were given this preface prior to being asked for their views on capital punishment. Rather, all but three were questioned in vague terms: "Would you share with us ... your personal feelings, if you could, in your own words how you do feel about the death penalty and capital punishment and secondly, do you feel you could serve on this type of a jury and actually render a decision that would result in the death of the Defendant in this case based on the evidence?" *Id.*, at 506.

There was an even more pronounced difference, on the apparent basis of race, in the manner the prosecutors questioned members of the venire about their willingness to impose the minimum sentence for murder. Under Texas law at the time of petitioner's trial, an unwillingness to do so warranted removal for cause. **[333]** *Huffman v. State*, 450 S.W. 2d 858, 861 (Tex.Crim.App. 1970), vacated in part, 408 U.S. 936, 92 S.Ct. 2860, 33 L.Ed.2d 753 (1972). This strategy normally is used by the defense to weed out pro-state members of the venire, but, ironically, the prosecution employed it here. The prosecutors first identified the statutory minimum sentence of five years' imprisonment to 34 out of

36(94%) white venire members, and only then asked: "If you hear a case, to your way of thinking [that] calls for and warrants and justifies five years, you'll give it?" App. 509. In contrast, only one out of eight (12.5%) African-American prospective jurors were informed of the statutory minimum before being asked what minimum sentence they would impose. The typical questioning of the other seven black jurors was as follows:

> "[Prosecutor]: Now, the maximum sentence for [murder] ... is life under the law. Can you give me an idea of just your personal feelings what you feel a minimum sentence should be for the offense of murder the way I've set it out for you?
>
> "[Juror]: Well, to me that's almost like it's premeditated. But you said they don't have a premeditated statute here in Texas.
>
> .....
>
> "[Prosecutor]: Again, we're not talking about self-defense or accident or insanity [1038] or killing in the heat of passion or anything like that. We're talking about the knowing--
>
> "[Juror]: I know you said the minimum. The minimum amount that I would say would be at least twenty years." *Id.*, at 226-227.

Furthermore, petitioner points to the prosecution's use of a Texas criminal procedure practice known as jury shuffling. This practice permits parties to rearrange the order in which members of the venire are examined so as to increase the likelihood that visually preferable venire members will be moved forward and empaneled. With no information about **[334]** the prospective jurors other than their appearance, the party requesting the procedure literally shuffles the juror cards, and the venire members are then reseated in the new order. Tex.Code Crim. Proc. Ann., Art. 35.11 (Vernon Supp.2003). Shuffling affects jury composition because any prospective jurors not questioned during voir dire are dismissed at the end of the week, and a new panel of ju-

rors appears the following week. So jurors who are shuffled to the back of the panel are less likely to be questioned or to serve.

On at least two occasions the prosecution requested shuffles when there were a predominant number of African-Americans in the front of the panel. On yet another occasion the prosecutors complained about the purported inadequacy of the card shuffle by a defense lawyer but lodged a formal objection only after the postshuffle panel composition revealed that African-American prospective jurors had been moved forward.

Next, we turn to the pattern and practice evidence adduced at petitioner's pretrial *Swain* hearing. Petitioner subpoenaed a number of current and former Dallas County assistant district attorneys, judges, and others who had observed firsthand the prosecution's conduct during jury selection over a number of years. Although most of the witnesses denied the existence of a systematic policy to exclude African-Americans, others disagreed. A Dallas County district judge testified that, when he had served in the District Attorney's Office from the late-1950's to early-1960's, his superior warned him that he would be fired if he permitted any African-Americans to serve on a jury. Similarly, another Dallas County district judge and former assistant district attorney from 1976 to 1978 testified that he believed the office had a systematic policy of excluding African-Americans from juries.

Of more importance, the defense presented evidence that the District Attorney's Office had adopted a formal policy to exclude minorities from jury service. A 1963 circular by the **[335]** District Attorney's Office instructed its prosecutors to exercise peremptory strikes against minorities: "'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.'" App. 710. A manual entitled "Jury Selection in a Criminal Case" was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service. Although the manual was written in 1968, it remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller-El's trial. *Id.*, at 749, 774, 783.

Some testimony casts doubt on the State's claim that these practices had been discontinued before petitioner's trial. For example, a judge testified that, in 1985, he had to exclude a prosecutor from trying cases in his courtroom for race-based discrimination in jury selection. Other testimony indicated that the State, by its own admission, once requested a jury shuffle in order to reduce the number of African-Americans in the venire. *Id.*, at 788. Concerns over the exclusion of African-Americans by the District Attorney's Office were echoed by Dallas County's Chief Public Defender.

This evidence had been presented by petitioner, in support of his *Batson* claim, to the state and federal courts that denied him relief. It is against this background that we examine whether petitioner's case should be heard by the Court of Appeals.

II

A

As mandated by federal statute, a state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253. Before an appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and **[336]** obtain a COA from a circuit justice or judge. This is a jurisdictional prerequisite because the COA statute mandates that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals ..." § 2253(c)(1). As a result, until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.

A COA will issue only if the requirements of § 2253 have been satisfied. "The COA statute establishes procedural

rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." *Slack*, 529 U.S., at 482, 120 S.Ct. 1595; *Hohn v. United States*, 524 U.S. 236, 248, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998). As the Court of Appeals observed in this case, § 2253(c) permits the issuance of a COA only where a petitioner has made a "substantial showing of the denial of a constitutional right." In *Slack*, *supra*, at 483, 120 S.Ct. 1595, we recognized that Congress codified our standard, announced in *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), for determining what constitutes the requisite showing. Under the controlling standard, a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" 529 U.S., at 484, 120 S.Ct. 1595 (quoting Barefoot, supra, at 893, n. 4, 103 S.Ct. 3383).

The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based **[337]** on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

To that end, our opinion in Slack held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances

where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "'has already failed in that endeavor.'" *Barefoot*, *supra*, at 893, n. 4, 103 S.Ct. 3383.

Our holding should not be misconstrued as directing that a COA always must issue. Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners. *Duncan v. Walker*, 533 U.S. 167, 178, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) ("'AEDPA's purpose [is] to further the principles of comity, finality, and federalism'" (quoting *Williams v. Taylor*, 529 U.S. 420, 436, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000))); *Williams v. Taylor*, 529 U.S. 362, 399, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (opinion of O'CONNOR, J.). The concept of a threshold, or gateway, test was not the innovation of AEDPA. Congress established a threshold prerequisite to appealability in 1908, in large part because it was "concerned with the increasing number of frivolous habeas corpus petitions challenging capital sentences which delayed execution pending completion of the appellate process ...." *Barefoot*, *supra*, at 892, n. 3, 103 S.Ct. 3383. By enacting AEDPA, using the specific standards the Court had elaborated earlier for the threshold test, Congress confirmed the necessity and the requirement of differential treatment for those appeals deserving of attention from those that plainly do not. It follows that issuance of a COA must not be *pro forma* or a matter of course.

[338] A prisoner seeking a COA must prove "'something more than the absence of frivolity'" or the existence of mere "good faith" on his or her part. *Barefoot*, *supra*, at 893, 103 S.Ct. 3383. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy §

2253 (c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S., at 484, 120 S.Ct. 1595.

B

Since Miller-El's claim rests on a *Batson* violation, resolution of his COA application requires a preliminary, though not definitive, consideration of the three-step framework mandated by *Batson* and reaffirmed in our later precedents. *E.g.*, *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (*per curiam*); *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion). Contrary to the state trial court's ruling on remand, the State now concedes that petitioner, Miller-El, satisfied step one: "[T]here is no dispute that Miller-El presented a prima facie claim" that prosecutors used their peremptory challenges to exclude venire members on the basis of race. Brief for Respondent 32. Petitioner, for his part, acknowledges that the State proceeded through step two by proffering facially race-neutral explanations for these strikes. Under *Batson*, then, the question remaining is step three: whether Miller-El "has carried his burden of proving purposeful discrimination." *Hernandez*, *supra*, at 359, 111 S.Ct. 1859.

As we confirmed in *Purkett v. Elem*, 514 U.S., at 768, 115 S.Ct. 1769, the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness **[339]** of the prosecutor's justification for his peremptory strike. At this stage, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Ibid.* In that instance the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.

In *Hernandez v. New York*, a plurality of the Court concluded that a state court's finding of the absence of discriminatory intent is "a pure issue of fact" accorded significant deference:

> "Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding 'largely will turn on evaluation of credibility.' 476 U.S., at 98, n. 21, 106 S.Ct. 1712. In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.' *Wainwright v. Witt*, 469 U.S. 412, 428, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), citing *Patton v. Yount*, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)." 500 U.S., at 365, 111 S.Ct. 1859.

Deference is necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations. "[I]f an appellate court accepts a trial court's finding that a prosecutor's race-neutral explanation for his peremptory challenges should be believed, we fail to see how the **[340]** appellate court nevertheless could find discrimination. The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." *Id.*, at 367, 111 S.Ct. 1859.

In the context of direct review, therefore, we have noted that "the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal" and will not be

overturned unless clearly erroneous. *Id.*, at 364, 111 S.Ct. 1859. A federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system. Where 28 U.S.C. § 2254 applies, our habeas jurisprudence embodies this deference. Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2); see also *Williams*, 529 U.S., at 399, 120 S.Ct. 1495 (opinion of O'CONNOR, J.).

Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence. In the context of the threshold examination in this *Batson* claim the issuance of a COA can be supported by any evidence demonstrating that, despite the neutral explanation of the prosecution, the peremptory strikes in the final analysis were race based. It goes without saying that this includes the facts and circumstances that were adduced in support of the prima facie case. Cf. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (in action under Title VII of the Civil Rights Act of 1964, employee's prima facie case and evidence that employer's **[341]** race-neutral response was a pretext can support a finding of purposeful discrimination). Only after a COA is granted will a reviewing court determine whether the trial court's determination of the prosecutor's neutrality with respect to race was objectively unreasonable and has been rebutted by clear and convincing evidence to the contrary. At this stage, however, we only ask whether the District Court's application of AEDPA deference, as stated in § § 2254(d)(2) and (e)(1), to petitioner's Batson claim was debatable amongst jurists of reason.

tioner's Batson claim was debatable amongst jurists of reason.

C

Applying these rules to Miller-El's application, we have no difficulty concluding that a COA should have issued. We conclude, on our review of the record at this stage, that the District Court did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case. Instead, it accepted without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial. The Court of Appeals evaluated Miller-El's application for a COA in the same way. In ruling that petitioner's claim lacked sufficient merit to justify appellate proceedings, the Court of Appeals recited the requirements for granting a writ under § 2254, which it interpreted as requiring petitioner to prove that the state-court decision was objectively unreasonable by clear and convincing evidence.

This was too demanding a standard on more than one level. It was incorrect for the Court of Appeals, when looking at the merits, to merge the independent requirements of §§ 2254(d)(2) and (e)(1). AEDPA does not require petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence. The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions. Subsection (d)(2) contains the unreasonable **[342]** requirement and applies to the granting of habeas relief rather than to the granting of a COA.

The Court of Appeals, moreover, was incorrect for an even more fundamental reason. Before the issuance of a COA, the Court of Appeals had no jurisdiction to resolve the merits of petitioner's constitutional claims. True, to the extent that the merits of this case will turn on the agreement or disagreement with a state-court factual finding, the clear and convincing evidence and objective unreasonableness standards will apply. At the COA stage, however, a court

need not make a definitive inquiry into this matter. As we have said, a COA determination is a separate proceeding, one distinct from the underlying merits. Slack, 529 U.S., at 481, 120 S.Ct. 1595; *Hohn*, 524 U.S., at 241, 118 S.Ct. 1969. The Court of Appeals should have inquired whether a "substantial showing of the denial of a constitutional right" had been proved. Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate.

In this case, the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors. The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members, and only one served on petitioner's jury. In total, 10 of the prosecutors' 14 peremptory strikes were used against African-Americans. Happenstance is unlikely to produce this disparity.

The case for debatability is not weakened when we examine the State's defense of the disparate treatment. The Court of Appeals held that "[t]he presumption of correctness is especially strong, where, as here, the trial court and state habeas court are one and the same." 261 F.3d, at 449. As we have noted, the trial court held its *Batson* hearing two years after the *voir dire*. While the prosecutors had proffered contemporaneous race-neutral justifications for many **[343]** of their peremptory strikes, the state trial court had no occasion to judge the credibility of these explanations at that time because our equal protection jurisprudence then, dictated by *Swain*, did not require it. As a result, the evidence presented to the trial court at the *Batson* hearing was subject to the usual risks of imprecision and distortion from the passage of time.

In this case, three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury. The prosecutors explained

that their peremptory challenges against six African-American potential jurors were based on ambivalence about the death penalty; hesitancy to vote to execute defendants capable of being rehabilitated; and the jurors' own family history of criminality. In rebuttal of the prosecution's explanation, petitioner identified two empaneled white jurors who expressed ambivalence about the death penalty in a manner similar to their African- American counterparts who were the subject of prosecutorial peremptory challenges. One indicated that capital punishment was not appropriate for a first offense, and another stated that it would be "difficult" to impose a death sentence. Similarly, two white jurors expressed hesitation in sentencing to death a defendant who might be rehabilitated; and four white jurors had family members with criminal histories. As a consequence, even though the prosecution's reasons for striking African-American members of the venire appear race neutral, the application of these rationales to the venire might have been selective and based on racial considerations. Whether a comparative juror analysis would demonstrate the prosecutors' rationales to have been pretexts for discrimination is an unnecessary determination at this stage, but the evidence does make debatable the District Court's conclusion that no purposeful discrimination occurred.

[344] We question the Court of Appeals' and state trial court's dismissive and strained interpretation of petitioner's evidence of disparate questioning. 261 F.3d, at 452 ("The findings of the state court that there was no disparate questioning of the *Batson* jurors ... [is] fully supported by the record"). Petitioner argues that the prosecutors' sole purpose in using disparate questioning was to elicit responses from the African-American venire members that reflected an opposition to the death penalty or an unwillingness to impose a minimum sentence, either of which justified for-cause challenges by the prosecution under the then applicable state law. This is more than a remote possibility. Disparate questioning did occur. Petitioner submits that disparate questioning created the appearance of divergent opinions even though the venire members' views on the relevant subject

might have been the same. It follows that, if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual. In this context the differences in the questions posed by the prosecutors are some evidence of purposeful discrimination. *Batson*, 476 U.S., at 97, 106 S.Ct. 1712 ("Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose").

As a preface to questions about views the prospective jurors held on the death penalty, the prosecution in some instances gave an explicit account of the execution process. Of those prospective jurors who were asked their views on capital punishment, the preface was used for 53% of the African-Americans questioned on the issue but for just 6% of white persons. The State explains the disparity by asserting that a disproportionate number of African-American venire members expressed doubts as to the death penalty on their juror questionnaires. This cannot be accepted without further inquiry, however, for the State's own evidence is inconsistent **[345]** with that explanation. By the State's calculations, 10 African-American and 10 white prospective jurors expressed some hesitation about the death penalty on their questionnaires; however, of that group, 7 out of 10 African-Americans and only 2 out of 10 whites were given the explicit description.

There is an even greater disparity along racial lines when we consider disparate questioning concerning minimum punishments. Ninety-four percent of whites were informed of the statutory minimum sentence, compared to only twelve and a half percent of African-Americans. No explanation is proffered for the statistical disparity. *Pierre v. Louisiana*, 306 U.S. 354, 361-362, 59 S.Ct. 536, 83 L.Ed. 757 (1939) ("'The fact that the testimony ... was not challenged by evidence appropriately direct, cannot be brushed aside.' Had there been evidence obtainable to contradict and disprove the testimony offered by petitioner, it cannot be

assumed that the State would have refrained from introducing it" (quoting *Norris v. Alabama*, 294 U.S. 587, 594-595, 55 S.Ct. 579, 79 L.Ed. 1074 (1935))). Indeed, while petitioner's appeal was pending before the Texas Court of Criminal Appeals, that court found a *Batson* violation where this precise line of disparate questioning on mandatory minimums was employed by one of the same prosecutors who tried the instant case. *Chambers v. State*, 784 S.W.2d 29, 31 (Tex.Crim.App.1989). It follows, in our view, that a fair interpretation of the record on this threshold examination in the COA analysis is that the prosecutors designed their questions to elicit responses that would justify the removal of African-Americans from the venire. *Batson, supra*, at 93, 106 S.Ct. 1712 ("Circumstantial evidence of invidious intent may include proof of disproportionate impact... We have observed that under some circumstances proof of discriminatory impact 'may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds'").

[346] We agree with petitioner that the prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury. Our concerns are amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the Dallas County District Attorney's Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past. App. 788 (noting that a prosecutor admitted to requesting a jury shuffle "because a predominant number of the first six, eight or ten jurors were blacks"). Even though the practice of jury shuffling might not be denominated as a *Batson* claim because it does not involve a peremptory challenge, the use of the practice here tends to erode the credibility of the prosecution's assertion that race was not a motivating factor in the jury selection.

Finally, in our threshold examination, we accord some weight to petitioner's historical evidence of racial discrimination by the District Attorney's Office. Evidence presented at the *Swain* hearing indicates that African-Americans almost categorically were excluded from jury service. *Batson*, *supra*, at 94, 106 S.Ct. 1712 ("Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the 'result bespeaks discrimination' "); *Vasquez v. Hillery*, 474 U.S. 254, 259, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) ("As early as 1942, this Court rejected a contention that absence of blacks on the grand jury was insufficient to support an inference of discrimination, summarily asserting that 'chance or accident could hardly have accounted for the continuous omission of negroes from the grand jury lists for so long a period as sixteen years or more'" (quoting *Hill v. Texas*, 316 U.S. 400, 404, 62 S.Ct. 1159, 86 L.Ed. 1559 (1942))); *Hernandez v. Texas*, 347 U.S. 475, 482, 74 S.Ct. 667, 98 L.Ed. 866 (1954) ("But it taxes our credulity to say that mere chance resulted in there being **[347]** no members of this class among the over six thousand jurors called in the past 25 years"). Only the Federal Magistrate Judge addressed the import of this evidence in the context of a *Batson* claim; and he found it both unexplained and disturbing. Irrespective of whether the evidence could prove sufficient to support a charge of systematic exclusion of African-Americans, it reveals that the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection. This evidence, of course, is relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions in petitioner's case. Even if we presume at this stage that the prosecutors in Miller-El's case were not part of this culture of discrimination, the evidence suggests they were likely not ignorant of it. Both prosecutors joined the District Attorney's Office when assistant district attorneys received formal training in excluding minorities from juries. The supposition that race was a factor could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards.

In resolving the equal protection claim against petitioner, the state courts made no mention of either the jury shuffle or the historical record of purposeful discrimination. We adhere to the proposition that a state court need not make detailed findings addressing all the evidence before it. This failure, however, does not diminish its significance. Our concerns here are heightened by the fact that, when presented with this evidence, the state trial court somehow reasoned that there was not even the inference of discrimination to support a prima facie case. This was clear error, and the State declines to defend this particular ruling. "If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.'" *Batson*, 476 U.S., at 98, 106 S.Ct. 1712 (quoting Norris, 294 U.S., at 598, 55 S.Ct. 579).

[348] To secure habeas relief, petitioner must demonstrate that a state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was "objectively unreasonable" in light of the record before the court. The State represents to us that petitioner will not be able to satisfy his burden. That may or may not be the case. It is not, however, the question before us. The COA inquiry asks only if the District Court's decision was debatable. Our threshold examination convinces us that it was.

The judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, concurring.

I join the Court's opinion, but write separately for two reasons: First, to explain why I believe the Court's willingness to consider the Antiterrorism and Effective Death Penalty Act of 1996's (AEDPA) limits on habeas relief in deciding whether to issue a certificate of appealability (COA) is in accord with the text of 28 U.S.C. § 2253(c). Second, to dis-

cuss some of the evidence on the State's side of the case--which, though inadequate (as the Court holds) to make the absence of a claimed violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), undebatable, still makes this, in my view, a very close case.

I

Many Court of Appeals decisions have denied applications for a COA only after concluding that the applicant was not entitled to habeas relief on the merits-- without even analyzing whether the applicant had made a substantial showing of a denial of a constitutional right. See, *e.g.*, *Kasi v. Angelone*, 300 F.3d 487 (C.A.4 2002); **[349]** *Wheat v. Johnson*, 238 F.3d 357 (C.A.5 2001).[1] The Court today disapproves this approach, which improperly resolves the merits of the appeal during the COA stage. Ante, at 1036, 1039-1040. Less clear from the Court's opinion, however, is why a "circuit justice or judge," in deciding whether to issue a COA, must "look *to the District Court's application of AEDPA* to [a habeas petitioner's] constitutional claims and ask whether *that resolution* was debatable amongst jurists of reason." *Ante*, at 1039 (emphasis added). How the district court applied AEDPA has nothing to do with whether a COA applicant has made "a substantial showing of the denial of a constitutional right," as required by 28 U.S.C. § 2253(c)(2), so the AEDPA standard should seemingly have no role in the COA inquiry.

Section 2253(c)(2), however, provides that "[a] certificate of appealability *may issue ... only if* the applicant has made a substantial showing of the denial of a constitutional right." (Emphasis added.) A "substantial showing" *does not entitle* an applicant to a COA; it is a necessary and not a sufficient condition. Nothing in the text of § 2253(c)(2) prohibits a circuit justice or judge from imposing additional requirements, and one such additional requirement has been

[1] In what can be regarded as a logical development from the error of analyzing a request for a COA like a merits appeal, some courts have simply allowed merits appeals to be taken *without* a COA--in flat contravention of . See, *e.g.*, *Bates v. Lee*, 308 F.3d 411 (C.A.4 2002).

approved by this Court. See *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (holding that a habeas petitioner seeking to appeal a district court's denial of habeas relief on procedural grounds must not only make a substantial showing of the denial of a constitutional right but *also* must demonstrate that jurists of reason would find it debatable whether the district court was correct in its procedural ruling).

The Court today imposes another additional requirement: A circuit justice or judge must deny a COA, even when the habeas petitioner has made a substantial showing that his **[350]** constitutional rights were violated, if all reasonable jurists would conclude that a substantive provision of the federal habeas statute bars relief. *Ante*, at 1039. To give an example, suppose a state prisoner presents a constitutional claim that reasonable jurists might find debatable, but is unable to find any "clearly established" Supreme Court precedent in support of that claim (which was previously rejected on the merits in state-court proceedings). Under the Court's view, a COA must be denied, *even if* the habeas petitioner satisfies the "substantial showing of the denial of a constitutional right" requirement of § 2253(c)(2), because all reasonable jurists would agree that habeas relief is impossible to obtain under § 2254(d). This approach is consonant with *Slack*, in accord with the COA's purpose of preventing meritless habeas appeals, and compatible with the text of § 2253(c), which does not make the "substantial showing of the denial of a constitutional right" a sufficient condition for a COA.

II

In applying the Court's COA standard to petitioner's case, we must ask whether petitioner has made a substantial showing of a *Batson* violation and also whether reasonable jurists could debate petitioner's ability to obtain habeas relief in light of AEDPA. The facts surrounding petitioner's *Batson* claims, when viewed in light of § 2254(e)(1)'s requirement that state-court factual determinations can be overcome only by clear and convincing evidence to the con-

trary, reveal this to be a close, rather than a clear, case for the granting of a COA.

Petitioner maintains that the following six African-American jurors were victims of racially motivated peremptory strikes: Edwin Rand, Wayman Kennedy, Roderick Bozeman, Billy Jean Fields, Joe Warren, and Carrol Boggess. As to each of them, the State proffered race-neutral explanations for its peremptory challenge. Five were challenged primarily because of their views on imposing the death penalty ([351] Rand, Kennedy, Bozeman, Warren, and Boggess), and one (Fields) was challenged because (among other reasons) his brother had been convicted of drug offenses and served time in prison. By asserting race-neutral reasons for the challenges, the State satisfied step two of *Batson*. See *Purkett v. Elem*, 514 U.S. 765, 767-768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam). Unless petitioner can make a substantial showing that (*i.e.*, a showing that reasonable jurists could debate whether) the State fraudulently recited these explanations as pretext for race discrimination, he has not satisfied the requirement of § 2253(c) (2). Moreover, because the state court entered a finding of fact that the prosecution's purported reasons for exercising its peremptory challenges were not pretextual, App. 878, a COA should not issue unless that finding can reasonably be thought to be contradicted by clear and convincing evidence. See § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence"). *Ante*, at 1039.

The weakness in petitioner's *Batson* claims stems from his difficulty in identifying any unchallenged white venireman similarly situated to the six aforementioned African-American veniremen. Although petitioner claims that two white veniremen, Sandra Hearn and Marie Mazza, expressed views about the death penalty as ambivalent as those expressed by Rand, Kennedy, Bozeman, Warren, and Boggess, the *voir dire* transcripts do not clearly bear that

out. Although Hearn initially stated that she thought the death penalty was inappropriate for first-time offenders, she also said, "I do not see any reason why I couldn't sit on a jury when you're imposing a death penalty." App. 694. She further stated that someone who was an extreme child abuser deserved the death penalty, whether or not it was a first-time offense. Reply Brief for Petitioner 14a. Hearn also made pro-prosecution statements about her distaste for criminal [352] defendants' use of psychiatric testimony to establish incompetency. *Id.*, at 17a. As for Mazza, her stated views on the death penalty were as follows: "It's kind of hard determining somebody's life, whether they live or die, but I feel that is something that is accepted in our courts now and it is something that--a decision that I think I could make one way or the other." App. 519.

Compare those statements with the sentiments expressed by the challenged African-American veniremen. Kennedy supported the death penalty only in cases of mass murder. "Normally I wouldn't say on just the average murder case--I would say no, not the death sentence." *Id.*, at 216. Bozeman supported the death penalty only "if there's no possible way to rehabilitate a person ... I would say somebody mentally disturbed or something like that or say a Manson type or something like that." *Id.*, at 79. When asked by the prosecutors whether repeated criminal violent conduct would indicate that a person was beyond rehabilitation, Bozeman replied, "No, not really." *Ibid.* Warren refused to give any clear answer regarding his views on the death penalty despite numerous questions from the prosecutors. *Id.*, at 139- 140 ("Well, there again, it goes back to the situation, you know, sometimes"); *id.*, at 140. When asked whether the death penalty accomplishes anything, Warren answered, "Yes and no. Sometimes I think it does and sometimes I think it don't [sic]. Sometimes you have mixed feelings about things like that." *Ibid.* When asked, "What do you think it accomplishes when you feel it does?," Warren replied, "I don't know." *Ibid.* Boggess referred to the death penalty as "murder," *id.*, at 197, and said, "whether or not I could actually go through with murder--with killing another

person or taking another person's life, I just don't know. I'd have trouble with that," *ibid.* Rand is a closer case. His most ambivalent statement was "Can I do this? You know, right now I say I can, but tomorrow I might not." *Id.*, at 161 (internal quotation marks omitted). Later on **[353]** Rand did say that he could impose the death penalty as a juror. *Id.*, at 162-164. But Hearn and Mazza (the white jurors who were seated) also said that they could sit on a jury that imposed the death penalty. At most, petitioner has shown that one of these African-American veniremen (Rand) may have been no more ambivalent about the death penalty than white jurors Hearn and Mazza. That perhaps would have been enough to permit the state trial court, deciding the issue *de novo* after observing the demeanor of the prosecutors and the disputed jurors, to find a *Batson* violation. But in a federal habeas case, where a state court has previously entered factfindings that the six African-American jurors were not challenged because of their race, petitioner must provide "clear and convincing evidence" that the state court erred, and, when requesting a COA, must demonstrate that jurists of reason could debate whether this standard was satisfied. *Ante*, at 1039.

Fields, the sixth African-American venireman who petitioner claims was challenged because of his race, supported capital punishment. However, his brother had several drug convictions and had served time in prison. App. 124. Warren and Boggess, two of the African-American veniremen previously discussed, also had relatives with criminal convictions--Warren's brother had been convicted of fraud in relation to food stamps, *id.*, at 153, and Boggess had testified as a defense witness at her nephew's trial for theft, *id.*, at 211, and reported in her questionnaire that some of her cousins had problems with the law, Joint Lodging 43. Of the four white veniremen who petitioner claims also had relatives with criminal histories and therefore "should have been struck" by the prosecution--three (Noad Vickery, Cheryl Davis, and Chatta Nix) were actually so pro-prosecution that *they were struck by the petitioner*. *Id.*, at 111. The fourth, Joan Weiner, had a son who had shoplifted at the age

of 10. App. 511. That is hardly comparable to Fields's situation, and Weiner was a strong State's juror for **[354]** other reasons: She had relatives who worked in law enforcement, *id.*, at 510, and her support for the death penalty was clear and unequivocal, id., at 506, 511.

For the above reasons, my conclusion that there is room for debate as to the merits of petitioner's *Batson* claim is far removed from a judgment that the State's explanations for its peremptory strikes were implausible.

With these observations, I join the Court's opinion.

Justice THOMAS, dissenting.

Unpersuaded by petitioner's claims, the state trial court found that "there was no purposeful discrimination by the prosecut[ion] in the use of ... peremptory strikes," App. 878. This finding established that petitioner had failed to carry his burden at step three of the inquiry set out in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Title 28 U.S.C. § 2254(e)(1) requires that a federal habeas court "presum[e]" the state court's findings of fact "to be correct" unless petitioner can rebut the presumption "by clear and convincing evidence." The majority decides, without explanation, to ignore § 2254(e)(1)'s explicit command. I cannot. Because petitioner has not shown, by clear and convincing evidence, that any peremptory strikes of black veniremen were exercised because of race, he does not merit a certificate of appealability (COA). I respectfully dissent.

I

A

The Court agrees, *ante*, at 1042, that the state court's finding at step three of *Batson* is a finding of fact ordinarily subject to § 2254(e)(1)'s presumption of correctness:

> "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual **[355]** issue made by a State court shall be presumed to be correct. The applicant shall

have the burden of rebutting the presumption of correctness by clear and convincing evidence."

However, the Court implicitly rejects the obvious conclusion that the COA determination under § 2253(c) is part of a "proceeding instituted by an application for a writ of habeas corpus." Instead of presuming the state court's fact-findings to be correct, as § 2254(e)(1) requires, the Court holds that petitioner need only show that reasonable jurists could disagree as to whether he can provide clear and convincing evidence that the finding was erroneous. *Ante*, at 1041.

The Court's main justification for this conclusion is supposed fidelity to *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). See *ante*, at 1040 ("'The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong' " (quoting *Slack*, *supra*, at 484, 120 S.Ct. 1595)). But neither *Slack* nor any other decision of this Court addressing the COA procedure has ever considered a "constitutional claim" that turns entirely on issues of fact. In these circumstances, it is the text of § 2254(e)(1) that governs.

Unlike the majority, I begin with the plain text of the statute that instructs federal courts how to treat state-court findings of fact. At issue is what constitutes a "proceeding" for purposes of § 2254(e)(1). The word, "proceeding," means "[t]he regular and orderly progression of a lawsuit, including *all acts and events between* the time of commencement and the entry of judgment." Black's Law Dictionary 1221 (7th ed.1999) (emphasis added). The COA, "standing alone, ... does not assert a grievance against anyone, does not seek remedy or redress for any legal injury, and does not even require a 'party' on the other side. It is nothing more than a request for permission to seek review." *Hohn v. United States*, 524 U.S. 236, 256, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998) (SCALIA, J., dissenting).

[356] I agree with the majority that the existence of a COA is a jurisdictional prerequisite to the merits appeal.

Ante, at 1039. However, the Court takes a wrong turn when it implies that the merits appeal is part of the habeas process (or "proceeding") but the COA determination somehow is not. Overwhelming authority (including the majority opinion) confirms that § 2254(e)(1) applies to the merits appeal. See *ante*, at 1042; *Weaver v. Bowersox*, 241 F.3d 1024, 1030 (C.A.8 2001); *Putman v. Head*, 268 F.3d 1223, 1241 (C.A.11 2001); *Johnson v. Gibson*, 254 F.3d 1155, 1160 (C.A.10 2001); *Francis S. v. Stone*, 221 F.3d 100, 114-115 (C.A.2 2000); *Weeks v. Snyder*, 219 F.3d 245, 258 (C.A.3 2000); *Mueller v. Angelone*, 181 F.3d 557, 575 (C.A.4 1999); *Ashford v. Gilmore*, 167 F.3d 1130, 1131 (C.A.7 1999); cf. *Sumner v. Mata*, 449 U.S. 539, 546- 547, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) (pre-Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) factual deference provision with virtually identical language applies to merits appeal). The COA determination should be treated no differently, because § 2254(e)(1) draws no distinction between the merits appeal and the COA. The Court's silent conclusion to the contrary is simply illogical. The COA's status as the jurisdictional prerequisite for the merits appeal requires that both the COA determination *and* the merits appeal be considered a part of the same "proceeding."

The Court's rejection of this conclusion also conflicts with pre-AEDPA practice. Prior to AEDPA, access to a merits appeal in federal habeas corpus proceedings was governed by a mechanism similar to the COA, known as a certificate of probable cause, or CPC. See *Slack*, *supra*, at 480, 120 S.Ct. 1595. There was also a standard of factual deference similar to, though weaker than, the standard in § 2254(e)(1). See 28 U.S.C. § 2254(d) (1994 ed.).[2] Under

[2] The pre-AEDPA standard of factual deference provided:

"In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction ... shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit [enumerated exceptions omitted].... And in an evidentiary hearing ... the burden shall rest upon the

these provisions (indistinguishable **[357]** from AEDPA's for these purposes), courts concluded that § 2254(e)(1)'s predecessor applied directly to the CPC proceeding, without any filtering through the "debatability" standard the Court has used in both the CPC and COA contexts. See, *e.g.*, *Barnard v. Collins*, 13 F.3d 871, 876-877 (C.A.5 1994); *Cordova v. Collins*, 953 F.2d 167, 169 (C.A.5 1992). These cases support the straightforward notion that § 2254(e)(1), like its predecessor did with respect to CPC proceedings, applies directly to the COA proceeding.

The Court's decision in *Hohn*, *supra*, which holds that the COA determination constitutes a "case" in the court of appeals for purposes of this Court's jurisdiction under 28 U.S.C. § 1254, is not to the contrary. *Hohn* does not hold, nor does its logic require, that the COA determination be regarded as separate from the rest of the habeas proceeding. In fact, *Hohn* rejected the proposition that "a request to proceed before a court of appeals should be regarded as a threshold inquiry separate from the merits (3)27." 524 U.S., at 246, 118 S.Ct. 1969 (emphasis added). Indeed, *Hohn* analogized the COA to the filing of a notice of appeal, *id.*, at 247, 118 S.Ct. 1969, which in the civil context all would consider to be part of the same "proceeding" ("instituted by" a complaint) as the trial and merits appeal.

B

The Court also errs, albeit in dicta, when it implies that delayed state factfinding--here the two years between *voir dire* and the post-trial *Batson* hearing[3]--is an excuse for **[358]** weakened factual deference. *Ante*, at 1042. Even putting aside the fact that an appellate court on direct review should (and would) still give heavy deference to 2-year-old

applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

[3] Not all the factfinding was so hindered. Prosecutors gave reasons for 2 of the 10 strikes of black veniremen at the post-trial *Batson* hearing. One of those, Joe Warren, is at issue here. App. 856-860.

credibility findings,[4] this reasoning is in tension with the plain text of § 2254(e)(1) and ignores changes wrought by AEDPA to the role of federal courts on collateral review.

Unlike an appellate court's review of district court findings of fact for clear error, § 2254(e)(1) establishes a presumption of correctness. It requires that the federal habeas court assume the state court that entered the findings was the best placed factfinder with the most complete record and *only then* ask whether the petitioner can refute that factual finding by clear and convincing evidence. Procedural imperfections ordinarily will not affect this presumption; thus, it does not matter whether the state judge made his decision two years late or with a less-than-perfect record. Admittedly these conditions might increase the *odds* that a habeas applicant could locate helpful evidence, but to "presume" facts "correct" means a court cannot allow a habeas applicant to evade § 2254(e)(1) by attacking the process employed by the state *factfinder* rather than the actual *factfindings*.

This reading is confirmed by the changes worked by AEDPA. Section 2254(e)(1) does not, as its predecessor did, create exceptions to factual deference for procedural infirmities. For example, prior to AEDPA, a federal habeas court **[359]** would not defer to state-court determinations of fact if " the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing," 28 U.S.C. § 2254(d)(2) (1994 ed.), "the material facts were not adequately developed at the State court hearing," § 2254(d)(3), or "the

[4] I am puzzled by the majority's willingness to hold against *respondent* the failure of prosecutors to testify at the post-trial *Batson* hearing. *Petitioner* could easily have requested that the reasons for the allegedly unconstitutional peremptory strikes be given again, and did not. The attorney representing the State at the post-trial *Batson* hearing made certain that both trial prosecutors were present to reiterate the reasons they gave in the record for striking the challenged black veniremen. App. 865. Petitioner's counsel explicitly refused the opportunity to do so when it was offered. *Ibid.* Furthermore, I fail to understand why a move that resulted in a more efficient hearing without redundant testimony should redound to the benefit of petitioner, who bears the burden of proof in this federal habeas corpus proceeding.

applicant did not receive a full, fair, and adequate hearing," § 2254(d)(6). The removal of these exceptions forecloses the use of marginal procedural complaints--such as a delay between *voir dire* and a *Batson* hearing--to determine whether or "how much" a federal habeas court will defer to state-court factfinding.

Section 2254(e)(1) simply cannot be read to contain an implied sliding scale of deference. I do not understand the Court to disagree with this view, however, as its dicta does not actually purport to interpret the text of § 2254(e)(1).[5]

II

Because § 2254(e)(1) supplies the governing legal standard, petitioner must provide "clear and convincing" evidence of purposeful discrimination in order to obtain a COA. Petitioner's constitutional claim under *Batson* turns on this fact and "reasonable jurists could debate," *ante*, at 1039 (internal **[360]** quotation marks omitted), whether a Batson violation occurred only if petitioner first meets his burden under § 2254(e)(1). And the simple truth is that petitioner has not presented anything remotely resembling "clear and convincing" evidence of purposeful discrimination.

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[5] I do, however, agree with the majority that the Court's decisions in *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), and *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) *(per curiam)*, can be helpful in guiding a federal habeas court deciding a claim under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). For instance, both cases confirm that *Batson* step three turns on an evaluation of the prosecutor's proffered race-neutral justifications for the peremptory challenges at issue. *Purkett*, *supra* at 768-769, 115 S.Ct. 1769; *Hernandez*, 500 U.S., at 364-365, 111 S.Ct. 1859 (plurality opinion); *id.*, at 372, 111 S.Ct. 1859 (O'CONNOR, J., concurring in judgment); see also *Batson*, *supra*. Additionally, because *Hernandez's* clear error standard is less demanding of a criminal defendant than is of a habeas applicant, a federal habeas court can deny relief on § 2254(e)(1) grounds if it determines it would do so when reviewing the same facts for clear error. Cf. *Marshall v. Lonberger*, 459 U.S. 422, 434-435, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983) ("We greatly doubt that Congress ... intended to authorize broader federal review of state court credibility determinations than are authorized in appeals within the federal system itself").

A

The evidence amassed by petitioner can be grouped into four categories: (1) evidence of historical discrimination by the Dallas District Attorney's office in the selection of juries; (2) the use of the "jury shuffle" tactic by the prosecution; (3) the alleged similarity between white veniremen who were not struck by the prosecution and six blacks who were: Edwin Rand, Wayman Kennedy, Roderick Bozeman, Billy Jean Fields, Joe Warren, and Carroll Boggess; and (4) evidence of so-called disparate questioning with respect to veniremen's views on the death penalty and their ability to impose the minimum punishment.

The "historical" evidence is entirely circumstantial, so much so that the majority can only bring itself to say it "casts doubt on the State's claim that [discriminatory] practices had been discontinued before petitioner's trial." *Ante*, at 1038. And the evidence that the prosecution used jury shuffles no more proves intentional discrimination than it forces petitioner to admit that he sought to eliminate whites from the jury, given that he employed the tactic even more than the prosecution did.[6] Ultimately, these two categories of evidence do very little for petitioner, because they do not address the genuineness of prosecutors' proffered race-neutral reasons for making the peremptory strikes of these particular jurors.

In short, the reasons that Justice SCALIA finds this to be a "close case," *ante*, at 1045 (concurring opinion), are reasons that, under the correct reading of § 2254(e)(1), it is a *losing* **[361]** case. I write further to explore two arguments advanced by petitioner that the Court deemed helpful in establishing petitioner's "debatable" entitlement to re-lief, apparently because the majority's "debatability" inquiry requires a less-thorough review of the record and a more permissive attitude toward a COA movant's representations.

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[6] Petitioner shuffled the jury five times; the prosecution did so only three times. Brief for Respondent 21.

B

As noted, petitioner argues the prosecution struck six blacks--Rand, Kennedy, Bozeman, Fields, Warren, and Boggess--who were similarly situated to unstruck whites. I see no need to repeat Justice SCALIA's dissection of petitioner's tales of white veniremen as ambivalent about the death penalty as Kennedy, Bozeman, Warren, and Boggess. *Ante*, at 1046-1048 (concurring opinion). However, the majority's cursory remark that "three of the State's proffered race-neutral rationales for striking [black] jurors pertained *just as well to some white jurors who were not challenged and who did serve on the jury*," *ante*, at 1043 (emphasis added), is flatly incorrect and deserves some discussion.

For the three challenged peremptory strikes used on Fields, Warren, and Boggess, petitioner has not even correctly alleged the existence of "similarly situated" white veniremen. The majority's discussion of this subject is misleading, stating that "prosecutors explained that their peremptory challenges against six [black] potential jurors were based on ambivalence about the death penalty; hesitancy to vote to execute defendants capable of being rehabilitated; and the [veniremens'] own family history of criminality." *Ibid.* The implication is that for each of the six challenged veniremen, the prosecution gave all three reasons as justifications for the use of a peremptory strike. To clarify: Rand, Kennedy, Bozeman, Warren, and Boggess were struck for ambivalence about the death penalty. Fields, Warren, and Boggess were struck for having family members **[362]** with criminal histories. Bozeman and Fields were struck for making prodefense remarks about rehabilitation.

Simple deduction, and an analysis of petitioner's contentions that includes the *names* of these allegedly similar white veniremen, compare *ibid.*, reveals that petitioner has unearthed no white venireman who, like Warren and Boggess, was *both* ambivalent about the death penalty *and* related to individuals who had previous brushes with the law.[7] Petitioner also produces no white venireman who, like Fields, expressed prodefense views on rehabilitation and had a family member with a criminal history.[8] "Similarly situated" **[363]** does not mean matching any one of several reasons the prosecution gave for striking a potential juror--it means matching all of them.

This leaves Rand, Kennedy, and Bozeman.[9] Petitioner alleges that white jurors Hearn and Mazza were as ambiva-

[7] Petitioner directs the Court to white veniremen Noad Vickery, Cheryl Davis, Chatta Nix, and Joan Weiner as having family members with criminal histories, but points to white veniremen Sandra Hearn and Marie Mazza as equally ambivalent about the death penalty. Brief for Petitioner 22. Of course, as Justice SCALIA demonstrates, Hearn and Mazza were *not* ambivalent about the death penalty. *Ante*, at 1047 (concurring opinion).

[8] Again petitioner points to Vickery, Davis, Nix, and Weiner for similar family histories. Justice SCALIA has shown that none of these four were in fact similarly situated to Fields with respect to this justification. *Ante*, at 1048 (concurring opinion). Petitioner also alleges that Hearn made prodefense remarks about rehabilitation similar to those made by Fields. Again, no white venireman even allegedly fits *both* reasons given for striking Fields. Furthermore, even if Fields had only been struck for his views on rehabilitation, those views were in no way equivalent to those expressed by Hearn. Fields answered "yes" to the question whether he believed that "everyone can be rehabilitated." App. 118. Fields went on to say that "[i]t may be far-fetched, but I feel like, if a person has the opportunity to really be talked about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation." *Ibid.* In contrast, Hearn stated that she "believe[d] in the death penalty if a criminal cannot be rehabilitated." *Id.*, at 694.

Petitioner tries to muddy the waters by pointing out that Fields was, in other respects, a good State's juror because he supported the death penalty. Brief for Petitioner 24-25. However, that does not change the fact that Fields said that everyone could be rehabilitated (and thus might have been swayed by a penitent defendant's testimony) and Hearn insisted that some people could not be rehabilitated. In analyzing *Batson* claims the focus should not be on the "*reasonableness* of the asserted nonracial motive ... [but] rather [on] the *genuineness* of the motive." *Purkett*, 514 U.S., at 769, 115 S.Ct. 1769 (emphasis in original).

[9] The prosecution's stated reasons for striking Bozeman were that he was ambivalent about the death penalty and that he made prodefense

lent about the death penalty as these three struck black veniremen. Justice SCALIA has adequately demonstrated that this is absurd with respect to Kennedy and Bozeman, but I agree that petitioner makes a slightly better case with Rand. Ante, at 1048 (concurring opinion). However, since the burden is on petitioner to show, by clear and convincing evidence, that Rand was struck because of his race, I find this sliver of evidence, even when combined with petitioner's circumstantial evidence, insufficient to rebut § 2254(e)(1)'s presumption.

C

Petitioner's accounts of "disparate questioning" also amount to little of substance. Petitioner argues that the prosecution posed different questions at *voir dire* depending on the race of the venireman on two subjects: the death penalty and the minimum punishment allowed under law. Neither accusation can withstand a careful examination of the full record or help petitioner assemble the requisite clear and convincing evidence.

[364] 1

Respondent counters petitioner's complaints about the so-called "graphic formulation" or "script" by arguing that this depiction was used only with those potential jurors who "expressed reservations about the death penalty in their juror questionnaires." Brief for Respondent 17. The majority discounts this explanation, stating that "[t]his cannot be accepted without further inquiry." *Ante*, at 1043. Under my view, however, petitioner bears the burden of showing purposeful discrimination by clear and convincing evidence.

The Court's treatment of this issue focuses on the apparent disparity in treatment of 10 black veniremen and 10

remarks about rehabilitation. This is one case where the prosecution gave multiple reasons for a strike and petitioner actually correctly *alleged* the existence of a similarly situated white venireman, Hearn. Petitioner believes, albeit erroneously, see *ante*, at 1047-1048 (SCALIA, J., concurring), that Hearn expressed similar ambivalence about the death penalty *and* made prodefense remarks about rehabilitation.

white veniremen who were supposedly similar in their opposition to the death penalty. The majority notes that only 2 out of these 10 whites got the graphic description while 7 out of 10 blacks did. *Ante*, at 1043-1044. But the Court neglects to mention that the eight white veniremen who petitioner thinks should have received the graphic formulation, Reply Brief for Petitioner 15, n. 19, were so emphatically opposed to the death penalty that such a description would have served no purpose in clarifying their position on the issue. No trial lawyer would willingly antagonize a potential juror ardently opposed to the death penalty with an extreme portrait of its implementation. The strategy pursued by the prosecution makes perfect sense: When it was necessary to draw out a venireman's feelings about the death penalty they would use the graphic script, but when it was overkill they would not.

The record demonstrates that six of these eight white veniremen were so opposed to the death penalty that they were stricken for cause without the need for the prosecution to spend a peremptory challenge. For example, John Nelson wrote on his questionnaire, "I believe that the State does not have the right to take anyone's life," Tr. of Voir Dire in No. F85-78668-NL (5th Crim. Dist. Ct., Dallas County, Tex.), p. 625 (hereinafter VDR) (internal quotation marks omitted), and testified flatly, "I would not be able to vote for the death **[365]** penalty."[10] *Id.*, at 614. Nelson was struck for cause. *Id.*, at 662-663. Linda Berk was "always" opposed to the death penalty, *id.*, at 1449, and felt so strongly on the subject that the prosecutor remarked upon her discomfort, after which she stated, "[y]ou're going to have to excuse me because I'm getting a little emotional, okay?" *Id.*, at 1445. Later, after she had begun crying, Berk was struck for cause. *Id.*, at 1478. Gene Hinson stated curtly, "I put on the form there that I didn't agree with it," *id.*, at 1648, and was struck for cause. Sheila White said, "I have always been

[10] Nelson was also a doctor and presumably did not need to have the lethal injection process described to him.

against ... the death penalty," *id.*, at 2056, and was struck for cause.

Even those two not struck for cause had firm views. Margaret Gibson said: "I don't believe in the death penalty. I don't know why it was started. I don't think it solves anything," *id.*, at 485, and was struck by the prosecution with a peremptory strike. And James Holtz thought the death penalty appropriate only if a policeman or fireman was murdered. *Id.*, at 1021. I can apprehend simply no reason to fault the prosecution for failing to give a more graphic description of lethal injection to prospective jurors with such firm views against capital punishment.

I recognize that these *voir dire* statements only indirectly support respondent's explanation because the graphic script was typically given at the outset of *voir dire*--before the above quoted veniremen had the chance to give their stark answers. Nevertheless, all available evidence supports respondent's view that those who were unclear in their views on the death penalty *in their juror questionnaires* received the graphic formulation--and that those who were adamantly for *or against* the death penalty in their questionnaires did not.

The jury forms at issue asked two questions directly relevant to the death penalty. Question 56 asked, "Do you believe in the death penalty?," offered potential jurors the [366] chance to circle "yes" or "no," and then asked them to "[p]lease explain your answer." See, *e.g.*, Joint Lodging 44 (Boggess questionnaire). Question 58 allowed potential jurors to circle "yes" or "no" in answering the following question: "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" *Ibid.*

First, as already noted, the deeper and clearer opposition to the death penalty on the part of the eight whites who did not receive the graphic script (but petitioner thinks should have) indirectly supports respondent's contention that this opposition came out in their questionnaires (presumably by an answer of "no" to question 56 and an answer of "yes" to question 58). But this is not the only evidence supporting respondent's view. Hinson, a white venireman who did not receive the graphic formulation, stated during *voir dire* that he "put on the form there that [he] didn't agree with [the death penalty] for both moral and religious reasons." VDR 1648. Similarly, Nelson, a white venireman not receiving the graphic formulation, stated on his questionnaire, "I believe that the State does not have the right to take anyone's life." *Id.*, at 625 (internal quotation marks omitted). Fernando Gutierrez, a juror who received the graphic formulation, answered "yes" to question 56, but also "yes" to question 58, indicating he had "moral, religious, or personal beliefs" that would obstruct his voting for the death penalty despite the fact that he believed in it. Joint Lodging 205.

The prosecution treated the black veniremen no differently. The blacks who did not receive the graphic formulation (whose questionnaires are contained in the record) all answered "yes" to question 56, stating they believed in the death penalty, and "no" to question 58, indicating that their beliefs wouldn't prevent them from imposing a death sentence. See *id.*, at 12 (Bozeman), 20 (Fields), 28 (Warren), 36 [367] (Rand). The black veniremen who were given the graphic formulation, by contrast, gave ambiguous answers on their juror questionnaires expressing hesitation, rather than philosophical opposition, to the death penalty. Boggess answered "yes" to question 56 but also "yes" to question 58. *Id.*, at 44. Kennedy answered "yes" to question 56 but indicated that he believed in the death penalty "[o]nly in extreme cases, such as multiple murders." *Id.*, at 51. Troy Woods answered "no" to question 56, but also "no" to question 58, indicating he *did not* believe in the death penalty but would have no personal objection to imposing it. *Id.*, at 180. He wrote "that *[sic]* not punishment," in the space provided for question 56. *Ibid.* It happened that, while not completely clear about it in the questionnaire (and hence receiving the graphic formulation), Woods was an enthusiastic supporter of the death penalty, and he was, in fact, seated on peti-

tioner's jury. Further confirming respondent's explanation, black veniremen Linda Baker, Janice Mackey, Paul Bailey, and Anna Keaton all gave unclear responses to questions 56 and 58 and all received the graphic formulation. See Tr. of Pretrial Hearings in No. F85-78660-NL (5th Crim. Dist. Ct., Dallas County, Tex.) (Def.Exh. 7).[11]

[368] To sum up, the correlation between questionnaire answers and the use of the graphic script is far stronger than any correlation with race. Sixteen veniremen clearly indicated on the questionnaires their feelings on the death penalty,[12] and 15 of them did not receive the graphic script.[13] Eight veniremen gave unclear answers and those eight veniremen got the graphic script.[14] In other words, for 23 out of 24, or 96%, of the veniremen for whom questionnaire information is available, the answers given accurately predict

[11] Questions 56 and 58, and the responses thereto, are found on page 6 of each questionnaire. Baker did not circle "yes" or "no" in answering question 56, but wrote "[m]y strongest feeling is against the death penalty; *however, being aware of the overcrowding in jails and the number of murders[,] I would have to know the facts to make a decision....*" (Emphasis added.) Baker also did not answer question 58, writing "undecided" instead. Mackey answered question 56 "no," indicating she did not believe in the death penalty, and wrote "Thou Shall Not Kill" in the explanation space. She then proceeded to answer question 58 "no" as well. Bailey circled "yes" in answering question 56, but wrote in "NO" with a circle around it, along with such explanations as "yes for a major crime" and "[n]o *one* have [sic] the right to take *anothe [sic]* ones *[sic]* life." (Emphases in original.) He then circled "no" in answering question 58. Keaton circled "no," indicating she did not believe in the death penalty, when she answered question 56, writing "It's not for me to punished *[sic]* anyone." However she then circled "no" in answering question 58, indicating that she did not have any objection to imposing the death penalty.

[12] See VDR 1648 (Hinson), 625 (Nelson); Joint Lodging 12 (Bozeman), 20 (Fields), 28 (Warren), 36 (Rand), 125 (Mary Sumrow), 132 (Ronnie Long), 140 (Weiner), 148 (Mazza), 156 (Vivian Sztybel), 164 (Debra McDowell), 172 (Kevin Duke), 189 (Brenda Walsh), 197 (Filemon Zablan), 213 (Hearn).

[13] Sztybel received the graphic script. VDR 2828.

[14] Boggess, Kennedy, Baker, Mackey, Bailey, Keaton, Gutierrez, and Woods.

whether they got the graphic script.[15] Petitioner's theory that race determined whether a venireman got the graphic script produces a race-to-script correlation of only 74%--far worse.[16]

2

Petitioner fares no better with his allegation that the prosecution employed two different scripts on the basis of **[369]** race when asking questions about imposition of the minimum sentence. Indeed, this disparate questioning argument is as flawed as the last one. Respondent admits that the different questioning on minimum sentences was used as an effort to get veniremen the prosecution felt to be ambivalent about the death penalty dismissed for cause. In making the decision whether to employ the "manipulative" minimum punishment script, prosecutors could rely on both the questionnaires and substantial voir dire testimony, as the minimum punishment questioning occurred much later in *voir dire* than the graphic formulation.

Seven black veniremen were given the allegedly "manipulative" minimum punishment script, all of whom were opposed to the death penalty in varying degrees. Rand, Kennedy, Bozeman, Warren, and Boggess' views on the death penalty have all been exhaustively discussed. This leaves Baker and Fields. Baker's views on the death penalty were so clearly ambivalent that she is not even the subject

[15] This analysis considers Hinson and Nelson as being clearly opposed to the death penalty in their questionnaires (answering question 56 "no" and question 58 "yes") and Kennedy as being ambiguous (though in fact he answered question 56 "yes" and 58 "no"). Even without these assumptions, 13 out of 15 veniremen who answered "yes" to question 56 and "no" to question 58--indicating clear support for the death penalty--did not receive the graphic script. And seven out of seven of those answering "no" and "no" or "yes" and "yes"--indicating ambiguous or mixed feelings about the death penalty--or not answering clearly at all received the graphic script. This yields an accuracy rate of 20 out of 22, or 91%.

[16] For whites, 10 out of 12 did not get the graphic script. For blacks, 7 out of 11 did get the graphic script. This means race predicted use of the graphic script only 74% of the time.

of petitioner's *Batson* challenge. And Fields' family history of criminality and views on rehabilitation, as earlier discussed, *supra*, at 1053, and n. 7, convinced the prosecution to use a peremptory strike.[17] Finally, petitioner's objection to the prosecution's decision not to use the "manipulative" punishment script on Woods, Reply Brief for Petitioner 17, n. 23, makes no sense. Woods gave answers indicating he would be an excellent State's juror--why would the prosecution have tried to eliminate him? Of course, if petitioner were correct that the prosecution sought to eliminate blacks then one might expect that all methods, including the use of the "manipulative" script, would have been deployed against Woods, who happened to also be black.

As with graphic questioning, respondent's explanation goes unrebutted by petitioner. Unless a venireman indicated he would be a poor State's juror (using the criteria that **[370]** respondent has identified here) *and would not otherwise be struck for cause or by agreement*, there was no reason to use the "manipulative" script. Thus, when petitioner points to the "State's failure to use its manipulative method with the vast majority of white veniremembers who expressed reservations about the death penalty," *ibid.*, he ignores the fact that of the 10 whites who expressed opposition to the death penalty, 8 were struck for cause or by agreement, *meaning no "manipulative" script was necessary to get them removed.* The other two whites were both given the "manipulative" script and peremptorily struck,[18] just like Rand, Kennedy, Bozeman, Fields, Warren, Boggess, and Baker.

Quite simply, petitioner's arguments rest on circumstantial evidence and speculation that does not hold up to a thorough review of the record. Far from rebutting § 2254(e)(1)'s presumption, petitioner has perhaps not even demonstrated that reasonable jurists could debate whether

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[17] The prosecution in fact used peremptory strikes on all seven of these black veniremen.

[18] See Joint Lodging 110; VDR 502-511 (Gibson), 1046-1050 (Holtz).

he has provided the requisite evidence of purposeful discrimination--but that is the majority's inquiry, not mine. Because petitioner has not demonstrated by clear and convincing evidence that even one of the peremptory strikes at issue was the result of racial discrimination, I would affirm the denial of a COA.

APPENDIX D

VOIR DIRE TRANSCRIPT EXCERPTS

* * * *

[1572] Q Okay. I see the distinction you're making there. I understand a little better what you're saying now. Can I ask you, Mr. Vickery, how you feel personally about the death penalty? Do you feel that it serves a purpose in our society? I remember growing up that there were shows, Queen for a Day or something like that, and if you were governor for a day or if you had the power to decide in the State of Texas whether there was a death penalty or not, would you have the death penalty in certain circumstances or would you not have it at all? How do you feel about it?

A I really don't know how I feel about it, to be honest with you. I think possibly it is something that is required, but then again as a human being, it's hard to say that you want to see someone die. I just honestly can't tell you, you know, how I feel.

Q I understand that these are difficult things and things we don't deal with every day or think about. You know that the death penalty exists and you know it's out there, but it is something that other people are dealing with.

* * * *

[1576] home, I see, but I bet you remember when he was growing up – at least the children I've been around. My little girl is four and she hasn't done this much yet, but children will come up to you and say, "Daddy, I want you to promise me something. I want you to promise you won't be mad if I tell you something." "Well, tell me what it is." "I'm not going to tell you. I just want you to promise you won't be mad before I tell you anything about it." You want to know what you're promising before you promise to do it. That's the kind of situation we're in here. I want you to know what you're promising to do and what you're dealing with before you have to do it.

I guess what it comes down to -- the bottom line is, Mr. Vickery, with that long-winded explanation, knowing that your actions could result through the system in the death of Thomas Joe Miller-El, do you feel like you could serve on a jury like this?

A Yes. I think I can make a decision. I don't think it would affect me mentally or physically. I don't think it would be a decision that I would want to make and I [1577] don't particularly want to make it, but I think I could.

Q Okay. You've said, Mr. Vickery, that you don't really know how you feel about the death penalty. Have you ever been opposed to it at any point? I mean, some people when they're younger and in college or whatever are opposed to it and as they get older, they become in favor of it or vice versa. Have you held strong feelings one way or the other ever?

A No, I haven't.

Q Okay. So this is just something that you haven't spent a great deal of time being concerned with because you haven't had to deal with it?

A That's correct. You know, you read about it and you hear about it, but you're put in a spot where you've got to make the decision and it's a different story. I would be like anyone else. I can sit in front of a TV and say, "They ought to hang the guy." That's just in your thoughts at that time and you're not there making that decision. You're not pulling rope.

Q Right. And that's why we're

* * * *

No. 03-_____

In the Supreme Court of the United States

THOMAS JOE MILLER-EL,
Petitioner,

v.

DOUGLAS DRETKE,
Director, Texas Department of Criminal Justice,
Institutional Division,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2004 one copy of the Petition for a Writ of Certiorari in the above-captioned matter was served by Federal Express, overnight delivery, to the party listed below.

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